93-613

No. 93——

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

TESORERIA GENERAL DE LA
SEGURIDAD SOCIAL DE ESPAÑA,
Petitioner,

v.

BANCO DE CREDITO INDUSTRIAL, S.A.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Where the competent executive agency of a foreign government provides a United States court with the interpretation of a treaty to which it, and not the United States, is a signatory, and which applies as foreign law to a dispute exclusively between citizens of the foreign nation, can the United States court usurp the power of the foreign sovereign by unilaterally disregarding such interpretation in favor of its own, in violation of judicial restraint, principles of treaty interpretation, and international comity?

LIST OF INTERESTED PERSONS AND RULE 29.1 NOTATION

The parties to the proceedings at the United States Court of Appeal for the Fifth Circuit were petitioner, Tesoreria General de la Seguridad Social de España, respondent, Banco de Credito Industrial, S.A. now Banco Exterior de España, S.A., and the crewmembers of the STOLT LUISA PANDO and the STOLT MARIA PANDO. The only parties having an interest in the instant petition for certiorari are Tesoreria and BCI.

Petitioners certify that they have no parent or subsidiary companies to be listed under this Court's Rule 29.1.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Tesoreria General de la Seguridad Social De España (hereafter "Tesoreria"), respectfully asks this Court to grant certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in consolidated civil proceedings on May 14, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, which is reported at 990 F.2d 827 (1993), is reprinted in the appendix hereto as Appendix A, pp. 1a-25a, *infra*.

The minute entries and judgments of the United States District Court for the Eastern District of Louisiana that

were the subject of the appeal are unpublished and are reprinted as Appendices B, C and D, pp. 26a-35a, *infra*.

JURISDICTION

This suit is based on the Court's admiralty and maritime jurisdiction and arises out of the arrest and subsequent judicial sale of two vessels, the STOLT LUISA PANDO and the STOLT MARIA PANDO, pursuant to Rule C of the Supplemental Admiralty Rules of the Federal Rules of Civil Procedure. Numerous claimants intervened in the consolidated proceedings to enforce alleged maritime liens and to foreclose on first preferred ship mortgages.

Petitioner, Tesoreria, the Spanish Social Security System, filed a claim for a preferred maritime lien for unpaid contributions on behalf of Spanish crewmen who served aboard the vessels. The District Court granted summary judgment in favor of respondent, Banco de Credito Industrial, S.A., now Banco Exterior de España, S.A. (hereafter "BCI"), denying Tesoreria's claim and giving BCI's Spanish preferred ship mortgages priority (Appendix B, pp. 26a). Judgment was entered on August 1, 1991 (Appendix C, pp. 33a-34a) and petitioner's Motion for New Trial or to Alter or Amend Summary Judgment was denied on September 30, 1991 (Appendix D, p. 35a). Petitioner appealed to the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. 1291 and 1292(a)(3). The Fifth Circuit issued its opinion on May 14, 1993 (Appendix A, pp. 1a-25a), affirming the District Court's holding. Petitioner filed a petition for rehearing, which was denied without reasons on July 19, 1993 (Appendix E, pp. 36a-38a).

Petitioner now invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1), having filed its petition within the time period provided by 28 U.S.C. § 2101(c) and this Court's Rule 13.1.

STATUTES INVOLVED

This case does not implicate any United States statutes. It invokes application of Spanish law, more particularly Article 2(2) of the 1926 International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages, Brussels, April 10, 1926 (Appendix J, pp. 55a-65a).

STATEMENT OF THE CASE

A. Preface

This case raises significant international and federal question issues involving international comity, recognition and application of foreign treaties, and the abuse of judicial powers by United States courts. The lower courts erred in fundamental points of treaty interpretation, and their holdings impermissibly and unnecessarily infringe upon the sovereignty of a foreign nation by eviscerating Spain's interpretation of its own law. The dangerous precedent set by this decision will have ramifications of an international, legal, and diplomatic nature, far beyond the facts of the case. Intervention by this Court is appropriate to rectify the incorrect procedure, analysis, and conclusion of the lower courts.

The dispute in this case centers around application of Spanish law, specifically the 1926 Brussels Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages (hereafter "1926 Convention") (reproduced at Appendix J, pp. 55a-65a). Spain is a signatory to the 1926 Convention and has incorporated its provisions into Spanish domestic law. Since it is conceded that Spanish law was the applicable law, United States courts simply had to apply the 1926 Convention as interpreted by Spain.[1] The government of

[1] Although the relevant provisions of the 1926 Convention are arguably susceptible to more than one interpretation, and indeed are interpreted differently by signatory nations, the only relevant interpretation to this case is Spain's, particularly since the United States is not a signatory to the 1926 Convention.

Spain, through the Ministry of Public Works and Transportation, Office of the General Secretary of Transportation, General Directorate of the Merchant Marine (hereafter "General Directorate"), the ministry charged with determining and applying Spanish law in respect to maritime liens, provided the Spanish interpretation of the 1926 Convention.[2] The District Court for the Eastern District of Louisiana, and subsequently the Court of Appeals for the Fifth Circuit, completely ignored the General Directorate's declarations, and instead substituted their own analysis and interpretation of the 1926 Convention in place of Spain's.

This matter is deserving of granting a writ of certiorari to determine the correctness of the fundamental point resolved by the lower courts; i.e. the basis for their treaty interpretation. The critical issue is the correctness of a United States court's ignoring a foreign nation's interpretation of a treaty to which it, and not the United States, is a signatory, in favor of the court's entirely inconsistent interpretation. It is submited that the faulty reasoning of the lower courts needs to be rectified so that the same fundamental errors are not repeated in future cases of treaty interpretation. Because these questions raise compelling issues of international law, and the extent to which the United States judiciary can infringe on the rights of a foreign nation to determine, regulate, and enforce its domestic policy, they are particularly well-suited for review by this Honorable Court. This Court's own stated criteria squarely apply for granting of writs in this matter. ". . . [t]he object of granting writs of certiorari on points of statutory or treaty interpretation is to

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[2] The district court was provided a letter from Mr. Cruz Ruiz (on the staff of the General Directorate) and an affidavit of Mr. Rodriguez Carrion, both representatives of Spain at international meetings on the topic of maritime liens and mortgages, (Appendices F & H, pp. 39a-42a and 45a-53a). The Fifth Circuit was also provided the declaration of the General Director himself (Appendix G, pp. 43a-44a).

determine the correctness of fundamental points that lower courts have resolved, not to assume those points to be correct in order to decide particular cases on reasoning useless elsewhere," *Chan v. Korean Air Lines Ltd.*, 490 U.S. 122 (1989), page 134, n.5.

B. District Court Proceedings

Petitioner, Tesoreria, is the Spanish Social Security Administration. Respondent, BCI, is a quasi governmental Spanish bank which held first preferred mortgages on two Spanish vessels, the STOLT MARIA PANDO and the STOLT LUISA PANDO. The vessels were owned and operated by a Spanish corporation, Maritima Antares. Maritima Antares employed Spanish crewmen aboard its vessels, on behalf of whom it was obligated to pay social security contributions to Tesoreria. Maritima Antares failed to pay the contributions, giving rise to the instant claim.

The STOLT LUISA PANDO and the STOLT MARIA PANDO were arrested by creditors under parallel proceedings in New Orleans, Louisiana and Houston, Texas. Tesoreria intervened in these proceedings to assert its preferred maritime lien for unpaid social security contributions. The proceedings were consolidated in New Orleans and the vessels were eventually sold, with the sale proceeds substituting for the res.

Ranking of the lien claimants was governed by the procedural law of the forum, whereas the issue of whether a claim gave rise to a substantive maritime lien was governed by Spanish law. With regard to Tesoreria's claim, the district court's narrow judicial function was simply to determine and apply Spanish law. As stated previously, Spain has adopted the provisions of the 1926 Convention as its substantive law governing the creation and existence of maritime liens. Article 2(2) of the 1926 Convention states that a preferred maritime lien exists in favor of all "claims arising out of the contract of engagement of the

master or crew of a vessel." *Tesoreria* submitted the declaration of Mr. Jose Antonio Cruz Ruiz (Appendix F, pp. 39a-42a) to the court, setting forth the Spanish position, which is, and always has been, that this broad language encompasses social security contributions. Since that was the official Spanish position, no additional source or analysis was required, and the inquiry should have ended with the court's perfunctory application of that law.

However, in order to clear up confusion created by BCI, Tesoreria also submitted evidence that Spain's interpretation of Article 2(2) was identical to the interpretation of other countries (France, Belgium, Italy), and was well supported by the history of the treaty, by Spanish non-maritime domestic law on the issue, by learned independent experts, and by the stated position of Messrs. Rodriguez Carrion (Appendix H, pp. 45a-53a) and Cruz Ruiz (Appendix F, pp. 39a-42a), representatives of the Spanish government at meetings related to amendment of the 1967 Brussels Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages (hereafter 1967 Brussels Convention). Although the district court had evidence of, and support for, Spain's official interpretation of the 1926 Convention, it interpreted Article 2(2) of that Convention by referring to the court's understanding of discussions relating to the *1967* Convention (to which Spain is not a signatory).

The court completely discounted declarations of any Spanish source regarding Spanish law, impermissibly interpreted the 1926 Convention in its own fashion, and held that Article 2(2) could not include social security contributions as wages, or their equivalent, and thus were primed by BCI's mortgages (*See* Minute Entry and Judgment, Appendices B & C, pp. 26a-34a). The district court subsequently denied Tesoreria's Motion for New Trial or to Alter or Amend Summary Judgment (Appendix D, p. 35a).

C. Proceedings Before the Fifth Circuit

Petitioner lodged an appeal with the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit deviated worse than the district court in its analysis. Instead of even attempting to ascertain and apply Spain's interpretation of Article 2(2) the court went on an academic journey in pursuit of its own preferred treaty interpretation, and improperly substituted its own judgment concerning how the 1926 Convention *should be* interpreted, for the official interpretation of Spain (Appendix A, pp. 1a-25a). The court ignored the pronouncements of the Spanish government representatives and astoundingly digressed into an analysis of whether Spain had adopted specific enacting legislation pursuant to the Protocol of the 1926 Convention, arguing that this was the only fashion in which a country could recognize the existence of a maritime lien for social security contributions. The court failed to recognize that Spain has simply adopted wholesale the provisions of the 1926 Brussels Convention and incorporated those provisions into its domestic laws. Spain's interpretation, i.e., its treaty intent, was that no specific additional legislation was necessary and Article 2(2) was effective on its own.

The court failed to explain why it was necessary to completely discredit the Spanish government's interpretation of the treaty, or on what authority it could substitute its own. After applying its novel treaty interpretation, it admittedly and impermissibly "digressed into the familiar" and relied on totally inapplicable United States law [3] to accommodate its incorrect view of the merits, entirely ignoring the fact that Spain already had spoken on the treaty and there was no need to re-interpret it.

The court was obviously confused from the outset as to its proper limited judicial function, as it requested guid-

[3] The Court relied on cases pertaining to pension funds and withholding taxes for the proposition that United States law does not recognize a lien for social security contributions.

ance on treaty interpretation. Not until oral argument at the Fifth Circuit was the question ever raised as to the manner in which a treaty should be interpreted. This had not been addressed by the parties for the obvious reason that "treaty" interpretation was never an issue. The only question, as the briefs of the parties correctly reveal, was simply what was Spanish law. There was never any need for the court to "interpret" any treaty, only to determine what was *Spain's* interpretation of the 1926 Convention and then to apply that interpretation to the facts.[4]

By engaging in intellectual gymnastics concerning how the 1926 Convention might be interpreted, the Fifth Circuit ignored the obvious: Spanish law alone applies to this dispute and Spain's official position is the only interpretation that matters. However, relying on its own novel flexing of judicial powers and its interpretation of Article 2(2), the court affirmed the district court's holding (Appendix A, p. 25a).

Petitioner filed a petition for rehearing, attaching the declaration of the Director General of the Spanish Merchant Marine himself, Mr. Rafael Lobeto Lobo (Appendix G, pp. 43a-44a). The declaration reconfirmed Spain's official interpretation, and was supported by an affidavit from the Spanish Consulate in New Orleans verifying that the Director General is the highest Spanish authority on maritime liens and mortgages (Appendix I, pp. 54a). Furthermore, the court was alerted to the possible international and diplomatic ramifications of, and the shock of the Spanish authorities to, its decision, yet it simply denied rehearing without reasons.

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[4] There is a substantial difference between intellectually interpreting a treaty in a vacuum, and determining the interpretation and intent of a signatory to the treaty. The Fifth Circuit incorrectly chose the former route.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT IMPERMISSIBLY EXCEEDED ITS JUDICIAL POWERS AND ENGAGED IN TREATY MAKING.

The Fifth Circuit impinged on the sovereignty of Spain, violated principles of international comity among nations and established principles of treaty interpretation, and exceeded its judicial powers. In substituting its own interpretation of the 1926 Convention for the interpretation given to it by the competent Spanish government authority, the Fifth Circuit thereby engaged in treaty making, an activity not within its judicial powers. *The Amiable Isabella* 5 L.Ed. 191 (Wheat 1821). In imposing its will as treaty-maker, the court failed to properly defer to Spain's interpretation of the 1926 Convention and usurped Spanish authority.

This Court has consistently held that the judiciary is limited to "give effect to the stipulation of [a] treaty in the manner and to the extent to which the parties [to it] have declared, and not otherwise." *The Amiable Isabella* 5 L.Ed. at 208. This is always the case, even if a court has been motivated by "equity or general convenience, or substantial justice." *Id.* Only the parties which are signatories to the treaty are competent to change its terms. *Id.*

A treaty *must* be interpreted so as to carry out the intention of its signatories. *Tucker v. Alexandroff*, 183 U.S. 424-437 (1892). *See* also, *Sumitomo Shoji America Inv. v. Avagliano*, 457 U.S. 176 (1982). Thus, the role of the court is limited to ascertaining and enforcing the intent of the signatories as *they* themselves have declared it (in this case only Spain), and *not* to deciding the preferred interpretation of the court.[5] However, the Fifth Circuit turned

[5] The court's analysis of the Protocol and whether or not Spain had effectively brought itself therein, and its analysis of what it thought the drafters of the 1926 and 1967 Conventions meant, is totally academic and inapplicable to the narrow issue in this case.

a blind eye to the stated position of the Spanish Government and to this Court's precedents and instead "[looked] first at the text of the legislation and then to any custom . . . and [finally] . . . to judicial decisions to the extent they fill in gaps left by law or custom," (Appendix A, p. 12a). Such an exercise, although academically accurate, is inapplicable in a case where the court is *not per se* interpreting a treaty, but only determining a foreign nation's interpretation of the treaty. It is also certainly not applicable in a case where that foreign nation has expressly provided the Court with the opinion of its competent authority concerning the proper interpretation. Whether Spain's interpretation might not be to the liking of a particular United States court, or may be a minority view, or whether the court feels that Spain's interpretation may not be the most intellectually or procedurally preferred method of treaty interpretation, is wholly irrelevant. Indeed, what anyone else thinks or says about how the treaty should be interpreted is of no moment when Spain's position is all that is legally required. To go beyond Spain's interpretation, and beyond the task of simply applying that interpretation, exceeds the permissible bounds of the court's function.[6]

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[6] The Fifth Circuit might have been more correct if the United States were a signatory, or if it were acting as an international tribunal passing judgment on proper treaty reading. It is not correct in the context of applying Spanish law to a matter over which it fortuitously has jurisdiction. An international tribunal seeks to determine the meaning of a treaty as a matter of international law. A Spanish court interpreting the same treaty seeks to determine its meaning for purposes of its application as domestic law. The 1926 Convention clearly is the domestic law of Spain. It is improper and incorrect for a United States court to do anything different than what a Spanish court could do faced with this issue: *See* 1 Restatement (Third), The Foreign Relations of the United States § 325, comment 4. The United States court is essentially sitting as a Spanish court, not an international tribunal, and is bound by Spanish substantive law.

For United States courts to ignore the specific intent of Spain and substitute their own interpretation is an abuse of discretion, an improper judicial function, and an affront to Spain's sovereignty. Unquestionably the declaration of the Spanish General Directorate provided the manner and extent of Spain's interpretation of the 1926 Convention. That declaration *must* be given due deference, particularly where the United States is not even a signatory to the 1926 Convention. A United States court has absolutely no competence to change or even question the terms dictated by Spain.

> [T]o alter, amend, or add to any treaty, by inserting any clause whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this Court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind.

The Amiable Isabella, supra, 5 L.Ed. at 208.

The Fifth Circuit's duties, functions, and, indeed, instructions could not be clearer. Thus, by exceeding its judicial powers, the court committed a procedural, legal and diplomatic *faux pas*, and in failing to defer to the intent of a treaty signatory engaged in impermissible treaty making.

II. IGNORING THE DECLARATION OF THE SPANISH AUTHORITY AND SUBSTITUTING ITS OWN INTERPRETATION OF FOREIGN LAW IS A VIOLATION OF ACCEPTED TREATY INTERPRETATION AND INTERNATIONAL COMITY, A USURPATION OF POWER, AND A WHOLLY UNNECESSARY AFFRONT TO THE SOVEREIGNTY OF A FRIENDLY NATION.

The Directorate General of the Merchant Marine is Spain's highest authority on maritime liens and mortgages (Appendix I, pp. 54a). It is undisputed that its word in that respect is Spanish law. Even United States law recognizes that ministries, departments and sections of foreign nations have the authority, power and recognition to negotiate, interpret and advise on what the terms of a treaty are and mean, and how they should be applied. Therefore, the nature and source of the applicable Spanish law is unquestioned in this case.

United States law is clear that "the meaning given [treaties] by the department of government particularly charged with their negotiation and enforcement is given great weight, *Kolovrat v. Oregon*, 366 U.S. 186, 194 (1961). Similarly, "the practice of treaty signatories counts as evidence of the treaty's proper interpretation since their conduct generally evinces their understanding of the agreement they signed" *United States v. Stuart*, 489 U.S. 353, 369 (1989). This practice is carried out by the administrative agencies charged with the treaty interpretation or execution; i.e. the Directorate General.

This Court has consistently held that when interpreting international treaties, courts must rely on the interpretations provided by the governmental departments whose duty it is to interpret and negotiate treaties. *Sumitomo Shoji America, Inc. v. Avagliano, supra.*

Lastly, "a court of the United States owes substantial deference to the construction [Spain] places on its domes-

tice law. Courts of this nation routinely accept plausible constructions of laws by the agencies charged with administering them," in *The Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992). *See* also, *Chevron USA Inc. v. National Resource Defense Council Inc.*, 467 U.S. 837 (1984). Clearly, the lower courts abused and exceeded their power, ignored the criteria established by this Court, and insulted Spanish sovereignty by not accepting a "plausible construction" of the 1926 Convention, provided to the courts by the General Directorate, the relevant and recognized Spanish authority.

Although the Spanish ministry charged with interpretation and enforcement of the relevant treaty provided direct evidence unequivocally setting forth Spain's official interpretation of Article 2(2) of the 1926 Convention (subsumed therein is the fact that Spain's reading of the Protocol is different than the Fifth Circuit's), for reasons of its own choosing the court ignored Spain's position and substituted its own analysis and interpretation of Spanish law. There is no justification for a United States court to refuse to allow Spain to interpret its own laws and treaties, especially where Spain has a substantial interest in doing so.[7] Nothing allows a United States court to go beyond the determination of the Directorate General, and certainly not to digress into its own academic exercise to reach its decision. Failure to recognize and defer to the interpretation of the 1926 Convention provided by the Spanish authority, is an outright affront to the government of Spain, a slap in the face to Spanish sovereignty, and

[7] As expounded upon by the Spanish officials and experts. Spain has a strong policy in favor of maintaining the primacy of social security contributions under its domestic law (*See* e.g. Appendix F, p. 39a and Appendix H, pp. 48a-52a). Whether or not Tesoreria's claim is afforded preferred status in this case has no impact on any other nation or any individuals other than Spanish subjects. (As stated above, Tesoreria, BCI, Maritima Antares and the crewmen are all Spanish entities.) There is no justification for the Fifth Circuit's decision to sabotage Spain's domestic policies.

contravenes United States Supreme Court precedent. Basically, the lower courts have told the recognized Spanish authority that it is less qualified than a United States court to properly interpret and apply Spanish law to Spanish subjects. This is a direct contradition of the professed American policy of global understanding and sends a message of insularity and disrespect for the laws, policies and sensitivities of other nations.

An example of a proper treaty analysis can be found in *The Matter of Oil Spill by the Amoco Cadiz, supra,* where the French authority provided a United States Court with its position on applicable French law. The Seventh Circuit correctly deferred to the French opinion and did *not* delve into an analysis of whether France's understanding of the law was correct: it simply accepted it and applied to because it was the position taken by the French state.

Alternatively, even if a United States court failed to intellectually accept the Spanish law and follow this Court's mandates on treaty interpretation, comity would still require it to apply the law provided by the relevant authority of the foreign nation.

> Comity is a recognition which one nation extends within its own territory to the legislative, executive, or judicial acts of another. It is not a rule of law, but one of practice, convenience, and expediency. Although more than mere courtesy and accommodation, comity does not achieve the force of an imperative or obligation. Rather, it is a nation's expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws. Comity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to it give it effect.

Somportex Limited v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3rd Cir. 1971) reh. den. 1971, cert. den. 405 U.S. 1017 (1972).

Comity and observance of international relations requires respect and recognition of the laws of foreign nations, regardless of whether said law evidences the preferred interpretation of a United States court. To ignore Spain's declaration regarding its own law violates comity, unnecessarily infringes on the right of Spanish authorities to regulate and determine matters affecting Spanish domestic policy, and fails to demonstrate due regard for international duty and convenience. The Fifth Circuit's actions threaten the mutual respect which nations must have for each other's laws and the trust and deference which nations must have in the information provided by the authorities of foreign countries.[8]

Furthermore, there was no basis to withhold comity in this case. Acceptance of comity, specifically acceptance and recognition of Spain's interpretation of the 1926 Convention, would not be contrary or prejudicial to the interests of the United States; how could it be, when the United States is not a signatory to the 1926 Convention and no United States parties are involved in this action? What does the United States care about the lien ranking in Spain of social security contributions? Comity is clearly applicable to this matter.

This is not simply a case where the court had to interpret foreign law without any guidance and chose a permissible interpretation of foreign law. To the contrary, Spain provided specific pronouncements concerning Spain's understanding, intent, and interpretation of a treaty, and this Court's precedent clearly set forth the manner in which that interpretation should be determined. Because of the gross violation of international comity and the usurpation of powers, and most importantly because of the direct

[8] What the Fifth Circuit has done is akin to a foreign court ignoring Congress' expression of legislative intent, or ignoring the United States State Department's official statement on the United States' understanding of a treaty to which it is a signatory and which will be applied to U.S. citizens. Certainly the U.S. would not take kindly to such a result, likewise, neither has Spain.

affront to Spain in ignoring the pronouncement of its own treaty law by the competent authority, the Ministry of Foreign Relations of Spain is presently studying an appropriate response. Petitioner understands that the Ministry of Foreign Affairs is preparing a diplomatic note to this Court regarding the failure of a United States court to recognize and apply the opinion of the General Directorate as Spain's official government position. If this court grants certiorari, the Ministry of Foreign Affairs may submit an amicus curiae brief. The American Bar Association, section on International Laws, is also aware of the violation of international legal principles which has occurred and might consider submitting an amicus curiae brief.[9] Suffice it to say that this decision has caused a stir in international and diplomatic circles where sensitivities regarding proper interpretation of treaty law and sovereignty, and recognition and respect of foreign authorities, are supreme.

The usurpation of powers and affront to the government of Spain cannot be overlooked or ignored, as it would completely upset the delicate balance upon which nations mutually recognize and grant deference to the treaties, laws, interpretations, intent, and policies of other sovereigns. Legal and diplomatic chaos would ensue if the courts of each country unilaterally interpreted the way they believe another country should interpret a treaty, and disregarded, for no reason, the valid stated interpretation of laws and objectives of other nations.

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[9] The Department of State of the United States, Spanish desk, has also been contacted and, not surprisingly, their position was of non-involvement, and of total and complete deference to the Spanish authority, since the U.S. is not a signatory to the 1926 Convention.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that in view of the issues of substantial international importance which exist in this case, the petition for writ of certiorari should be granted.

Respectfully submitted,

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October 18, 1993

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 91-3922, 92-3100 and 92-3298

BANCO DE CREDITO INDUSTRIAL, S.A.,
Plaintiff-Appellee,

v.

TESORERIA GENERAL DE LA,
Intervenor-Appellant,

v.

STOLT LUISA PANDO MT.,
Defendants.

PARCEL TANKER, INC.,
Plaintiff,

and

BANCO DE CREDITO INDUSTRIAL, S.A.,
Plaintiff-Appellee,

v.

TESORERIA GENERAL DE LA,
Intervenor-Appellant,

v.

STOLT LUISA PANDO, MT., *et al.*,
Defendants.

WOODHOUSE DRAKE & CARRY, LTD.,
Plaintiff,

and

BANCO DE CREDITO INDUSTRIAL, S.A.,
Plaintiff-Appellee,

v.

TESORERIA GENERAL DE LA,
Intervenor-Appellant,

v.

STOLT LUISA PANDO MT.,
Defendant.

BANCO DE CREDITO INDUSTRIAL, S.A.,
Plaintiff-Appellee,

v.

TESORERIA GENERAL DE LA,
Intervenor-Appellant,

v.

M/T STOLT MARIA PANDO, *in rem, et al.*,
Defendants.

BANCO DE CREDITO INDUSTRIAL, S.A.,
Plaintiff-Appellee,

v.

STOLT LUISA PANDO MT.,
Defendants,

FELIX ACHA FERNANDEZ, *et al.*, CREWMEMBERS OF
STOLT LUISA PANDO MT.,
Intervenors-Appellants.

PARCEL TANKER, INC.,
Plaintiff,

and

BANCO DE CREDITO INDUSTRIAL, S.A.,
Plaintiff-Appellee,
v.

STOLT LUISA PANDO MT., *et al.*,
Defendants,

FELIX ACHA FERNANDEZ, *et al.*, CREWMEMBERS OF
STOLT LUISA PANDO MT.,
Intervenors-Appellants.

BANCO DE CREDITO INDUSTRIAL, S.A.,
Plaintiff-Appellee,
v.

STOLT LUISA PANDO, MT., *et al.*,
Defendants,

FELIX ACHA FERNANDEZ, *et al.*, CREWMEMBERS OF
STOLT LUISA PANDO MT.,
Intervenors-Appellants.

BANCO DE CREDITO INDUSTRIAL, S.A.,
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STOLT LUISA PANDO, MT., *et al.*,
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STOLT LUISA PANDO MT.,
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PARCEL TANKER, INC.,
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BANCO DE CREDITO INDUSTRIAL, S.A.,
Plaintiff-Appellee,

v.

STOLT LUISA PANDO, MT., *et al.*,
Defendants,

FELIX ACHA FERNANDEZ, *et al.*, CREWMEMBERS OF STOLT LUISA PANDO MT.,
Intervenors-Appellants.

Appeals from the United States District Court
for the Eastern District of Louisiana

May 14, 1993

Before DUHÉ and BARKSDALE, Circuit Judges, and HUNTER,[1] District Judge.

DUHÉ, Circuit Judge:

Two vessels subject to valid mortgages under Spanish law were seized by the mortgage-holder and sold in an American forum. Various claimants sought to intervene and share in the sale proceeds. The district court ascertained the validity of the various claims, and then ranked them. Appellants argue that the district court erred by denying preferred maritime lien status to claims for unpaid social security contributions due an agency of the Spanish government, and by denying a motion to intervene by the crewmembers of the seized vessels. We find no reversible error, and affirm.

I. *Background and Procedural History*

In July 1990, the vessels STOLT LUISA PANDO and STOLT MARIA PANDO were arrested.[2] Both vessels were owned by Maritima Antares, S.A., a Spanish corporation, and were subject to a first preferred ship mortgage held by Banco de Credito Industrial, S.A.[3] ("BCI"), another Spanish entity. These vessels were sold by judicial auction, and over $40 million was placed in the district court's registry.

Into this fray ventured Tesoreria General de la Seguridad Social de Espana ("Tesoreria General"), the Spanish Social Security administration. Tesoreria General alleged

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[1] Senior District Judge of the Western District of Louisiana, sitting by designation.

[2] The STOLT MARIA PANDO was arrested in Houston, and the STOLT LUISA PANDO was arrested in New Orleans. The proceedings were later consolidated in New Orleans.

[3] The real party in interest is Banco Exterior de Espana, S.A., the successor entity to Banco de Credito Industrial.

that Maritima Antares failed to remit to it social security contributions for the seamen employed by Maritima Antares aboard the STOLT LUSIA PANDO and the STOLT MARIA PANDO. Tesoreria General attempted to satisfy Maritima's obligation out of the sale proceeds deposited in the court's registry.

Also seeking acecss to these funds were crewmembers who had served aboard the respective ships.[4] Crewmen asserted that they were entitled to a "preferred maritime lien" for wages due them. *See* 46 U.S.C. § 31301(5)(D) (Supp.1992).[5] Preferred maritime liens "prime" or outrank a preferred ship mortgage. *Id.* at § 31326(b)(1). If the seamen's wage claim was permitted, it would take priority over BCI's vessel mortgage.

The district court allowed only partial intervention. Crewmembers were permitted to assert claims they may have against BCI for monies withheld by Maritima but not remitted to the appropriate agencies of the Spanish government. The district court, however, denied the seamen's request to assert claims against Maritima Antares and the sale proceeds. The crewmembers were given a deadline within which to file materials to support a claim against BCI. When this deadline passed without any action by the crewmembers, the court dismissed the crewmembers' intervention request in its entirety. The crewmembers now urge us to find that the district court's decision went beyond the dictates of Federal Rule Civil

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[4] The crewmembers did not seek to intervene in the action until January 1992, "on the eve of the hearing concerning substitution of security and distribution of funds—and eighteen months after the vessels were seized," *Parcel Tankers, Inc. v. M/T STOLT LUISA PANDO*, 787 F.Supp. 614, 616 (E.D.La.1992).

[5] The funds that were taken from the crew's pay, ostensibly as social security contributions but never remitted to the Spanish government, form the basis of both Appellees' claims. The seaman [sic] characterize these withheld funds as wages that are due them.

Procedure 24,[6] and that intervention against the sale proceeds should have been permitted.

The district court also held that BCI's ship mortgage was a "preferred mortgage" under 46 U.S.C. § 31301(6)(B).[7] In an attempt to prime BCI's preferred ship mortgage, Tesoreria General asserted that its claim for unpaid social security contributions was in the same preferred category and entitled to the same status as claims for crew wages. The district court concluded that the law of Spain governed the "validity and substance" of Tesoreria General's lien claim because that lien, if any, would have to be created under Spanish law. Neither party contests the application of Spanish law to this issue. Tesoreria General contends that the district court incorrectly determined that Spain does not accord lien status, similar to a claim for wages, to unpaid social security contributions.

II. *Crewmembers' Claims*

The district court held that the crewmen did not have an "interest relating to the property or transaction," as required in Rule 24, at least with regard to assessing sale proceeds held by the court. *See* Fed.R.Civ.P. 24(a)(2). It found that the crewmen assigned any wage claims they may have had against Maritima Antares to BCI by virtue

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[6] Fed.R.Civ.P. 24(a) provides:

> Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

[7] This provision extends preferred mortgage status to foreign creditors "if the mortgage, hypothecation, or similar charge was executed under the laws of the foreign country under whose laws the ownership of the vessel is documented and has been registered under those laws in a public register at the port of registry of the vessel or at a central office." 46 U.S.C. § 31301(6)(B) (Supp. 1992).

of a January 1991 Agreement negotiated between BCI and the seaman's representative, the Merchant Marine Syndicate U.G.T. ("the Union").

The *de novo* standard governs our review of the crewmens' intervention request. *See United States v. Texas Eastern Transmission Corp.*, 923 F.2d 410, 413 (5th Cir.1991); *Mothersill D.I.S.C. Corp. v. Petroleos Mexicanos, S.A.*, 831 F.2d 59, 61-62 (5th Cir.1987). Our review of the district court's interpretation of the January 1991 agreement is also *de novo*. *Shelton v. Exxon Corp.*, 921 F.2d 595, 602 (5th Cir.1991).

The crewmens' [sic] right to intervene turns on whether or not the January 1991 agreement between the Union and BCI abrogated potential wage claims the crewmen could assert against Maritima Antares. If the district court was correct in concluding that, by virtue of the January 1991 agreement, the crewmembers assigned all wage claims to BCI, the seamen do not posess the necessary interest in the controversy to support intervention of right. *See* Fed.R.Civ.P. 24(a)(2); *New Orleans Public Service, Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 466 (5th Cir.) (en banc), *cert. denied*, 469 U.S. 1019, 105 S.Ct. 434, 83 L.Ed.2d 360 (1984).

Like the district court, we find nothing ambiguous about the January 1991 agreement. In its opening paragraph, the Merchant Marine Syndicate U.G.T. indicates that it is acting in a representative capacity on behalf of the employees of Maritima Antares, S.A. *See* Case No. 92-3100 R. vol. 1, at 74.[8] The latter provisions of the agreement clearly evince the intent of the parties:

> FIRST—That, by virtue of proceedings pursuant to the employment regulation approved by the Resolution of 12-13-90 and adopted by the Provincial Labor Directorate of Cantabria on 12-21-90, the em-

[8] *See also Parcel Tankers, Inc.*, 737 F.Supp. at 617 n. 3 (no claim that Union was without authority to act for seamen).

ployment relations of CIA, MARITIMA ANTARES, S.A. and its seamen were resolved.

SECOND—That the CIA, MARITIMA ANTARES, S.A. owes said employees, included in the aforementioned proceedings, the amount of 414,931,064 million pesetas for wages up to 12-21-90, [which figure] includes the final liquidation of its debts.

* * * *

THIRD—That BANCO DE CREDITO INDUSTRIAL, S.A. is a creditor of CIA, MARITIMA ANTARES, S.A., having secured its advances with mortgages on the following vessels belonging to the company, STOLT MARIA PANDO, STOLT LUISA PANDO. . . .

FOURTH—In that the aforementioned labor credits owed to the employees have preferred status with respect to the mortgage credits held by BANCO DE CREDITO INDUSTRIAL, S.A. in accordance with the legislation specifically controlling maritime credits [liens], said Bank is interested in acquiring the referenced credits [held by the employees] and, as the employees are in agreement, both parties do so in conformity with the following[.]

Id. at 74-75.

From the foregoing, it is evident that both parties were aware they were bringing the matter to a conclusion: the employment relations between Maritima Antares and the seamen were "resolved," and this resolution was approved by the Provincial Labor Directorate. BCA acquired the labor credits, because they "have preferred status with respect to the mortgage credits held by [BCI]. . . ." We agree with the district court that the January 1991 agreement was a "buyout" of the seamen's potential wage claims to protect the rank of the BCI mortgage. *Cf.* 46 U.S.C. § 31305 (Supp.1992) (ability of lien holder

to waive and subordinate rights). The contract conclusively shows that this was the parties' intent. "When interpreting the meaning of a contract it is the objective, and not the subjective intent of the parties which controls. When a contract is unambiguous, the instrument alone is taken to express the intent of the parties." *Swaminathan v. Swiss Air Transport Co., Ltd.*, 962 F.2d 387, 389 (5th Cir.1992); *see Shelton v. Exxon Corp.*, 921 F.2d 595, 603 (5th Cir.1991).[9]

The January 1991 agreement usurped any claim to the sale proceeds that the crewmembers might have had. Therefore, we conclude that the crewmembers have no basis to claim intervention of right. Rule 24(a)(2) provides non-parties with a means of intervening in an ongoing dispute only if the applicant has an interest relating to the property or transaction which is the subject of the action. *See Mothersill D.I.S.C. Corp.*, 831 F.2d at 61; *see also New Orleans Public Service, Inc.*, 732 F.2d at 466 ("[A] legally protected interest is required for intervention under Rule 24(a)(2), and such intervention is improper where the intervenor does not itself possess the only substantive legal right it seeks to assert in the action.").

The crewmembers argue that the district court went beyond the minimal showing of interest called for under Rule 24, and instead treated the intervention request as a motion for summary judgment on the merits of the

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[9] Though the contract is facially unambiguous, the agreement is further clarified by the circumstances surrounding its confection. The Union was aware that Maritima Antares was liable for back wages, and that BCI was very interested in pursuing a settlement of these potential claims. The Union entered into negotiations on behalf of the affected seamen, and the resulting compromise was approved by an agency of the Spanish government. BCI paid the Union $16 million for potential wage claims, an amount that was curiously close to the seamen's "preliminary estimate" of $17 million due from Maritima Antares in back wages.

crewmembers' claims. The district court, however, is not bound to blindly accept the intervention request:

> Fifth Circuit precedent establishes that "the inquiry under subsection (a)(2) is a flexible one, which focuses on the particular facts and circumstances surrounding each application. . . . [and] intervention of right must be measured by a practical rather than a technical yardstick."

United States v. Texas Eastern Transmission Corp., 923 F.2d 410, 413 (5th Cir.1991) (quoting *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 841 (5th Cir.1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976)).

The district court was correct to scrutinize the January 1991 agreement to ascertain if the crewmembers met the requirements for Rule 24(a)(2) intervention without looking at the basis for the seamen's request, as the crewmembers argue, would have necessitated further delay in the disposition of assets tied up in the court's registry.[10]

III. *Tesoreria General's Claim for Unpaid Social Security Contributions*

Tesoreria General and BCI agree that Spanish law governs the substance of Tesoreria General's claim for unpaid social security contributions. Therefore, we must evaluate whether or not Spain recognizes a maritime lien, similar to that given seamen's wage claims, for the claims

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[10] The district court discussed the possibility that the crewmembers might have had a viable claim that was independent of the claims settled in the January 1991 agreement. *See Parcel Tankers, Inc.*, 787 F.Supp. at 620. This potential claim would lie only against BCI, by virtue of a July 1990 agreement with the Union to avert labor difficulties following the arrests of Maritima Antares's vessels. *Id.* The crewmembers were granted limited intervention in the pending action to "prove up" any claims against BCI. No action was taken towards this end, and the crewmembers abandoned this claim on appeal.

Tesoreria General now asserts. After Spanish law determines its substantive nature, the law of the forum (U.S.) will rank Tesoreria General's lien claim in the pecking order of the sale proceeds distribution. *See Brandon v. S.S. DENTON*, 302 F.2d 404, 410-11 (5th Cir.1962).

We review questions regarding foreign law *de novo*. Fed.R.Civ.P. 44.1. This analysis is plenary; a circuit court "owes no deference to the district court's determination of foreign law, and may consider information not available to the district court." *Mobile Marine Sales, Ltd. v. M/V PRODROMOS*, 776 F.2d 85, 89 (3rd Cir. 1985) (citing *Kalmich v. Bruno*, 553 F.2d 549, 552 (7th Cir.1977)); *see generally* John R. Brown, "44.1 Ways to Prove Foreign Law," 9 *Mar. Law*, 179, 195 (1984).[11]

Spain's legal system is civilian in nature. Therefore, the role of positive legislation is emphasized at the expense of stare decisis. *See Henry v. S/S BERMUDA STAR*, 863 F.2d 1225, 1230-32 (5th Cir.1989). To correctly interpret Spanish law, we look first to the text of the legislation, and then to any customs which have developed with respect to its application. Finally, we can turn to judicial decisions to the extent that they fill in gaps left by law or custom. *See id.* (interpreting Panamanian law according to civilian principles).[12]

Tesoreria General advances two lines of reasoning to support its position that Spain confers preferred status on a claim for unpaid social security obligations: First, Tesoreria General contends that Spanish internal law accords unpaid wages and unpaid social security obligations

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[11] Consequently, although the district court declined to review certain affidavits submitted by the parties, we can examine the proffered materials. *See* Charles Alan Wright, Et Al., 9 *Federal Practice and Procedure* § 2444 (1971 & Supp. 1992).

[12] Our interpretation is also governed by Fed.R.Civ.P. 44.1, which permits consideration of "any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence."

parallel treatment. Second, Spain is a signatory nation to the International Convention for the Unification of Certain Rules Related to Maritime Liens and Mortgages, 100 L.N.T.S. 187, signed in Brussels in 1926, and formally ratified by Spain in 1930 ("Brussels Convention") (*reprinted in* 6A *Benedict on Admiralty* 8-17 (7th ed. 1993)). Tesoreria General asserts that this convention is broadly written, and encompasses social security contributions in the section which creates a maritime lien for crew wages. We address these arguments in reverse order.[13]

A. *1926 Brussels Convention*

Initially, it is helpful to review the applicable provisions of the 1926 Brussels Convention:

> ARTICLE 2
>
> The following give rise to a maritime lien on a vessel, on the freight for the voyage during which the claim giving rise to the lien arises, and on the accessories of the vessel and freight accrued since the commencemnt of the voyage:
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> * * * *

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[13] Tesoreria General's position on the role of Spanish internal law in this dispute has not been entirely consistent. At one point Tesoreria General argued: "It is clear that as per the decree of the Spanish Supreme Court of May 22, 1989, the Brussels Convention of 1926 is *the sole law presently applicable to the establishment of preferred maritime liens.*" Case No. 91-3922 R. vol. 5, at 1464 (Tesoreria General's Supplemental Memorandum in Opposition to BCI's Motion for Partial Summary Judgment) (emphasis added).

In its brief and argument on appeal, however, Tesoreria General has drawn a parallel between the "super privilege" accorded social security contributions under Spain's Internal laws, and the preferred status for the maritime lien it now seeks to assert. *See* Case No. 91-3922 R. vol. 6, at 1824 (Affidavit of Professor J.L. Rodriguez Carrion).

2. Claims arising out of the contract of engagement of the master, crew, and other persons hired on board[.]

* * * *

ARTICLE 3

The mortgages, hypothecations, and other charges on vessels referred to in Article 1 rank immediately after the secured claims referred to in the preceding Article.

National laws may grant a lien in respect of claims other than those referred to in the said last-mentioned Article, so, however, as not to modify the ranking of claims secured by mortgages, hypothecations, and other similar charges, or by the liens taking precedence thereof.

* * * *

PROTOCOL OF SIGNATURE

In the proceeding to the signature of the International Convention for the unification of certain rules relating to maritime liens and mortgages, the undersigned Plenipotentiaries have adopted the present Protocol, which will have the same force and the same value as if the provisions were inserted in the text of the Convention to which it relates:

I. It is understood that the legislation of each State remains free

1. to establish among the claims mentioned in no. 1 of Article 2, a definite order of priority with a view to safeguarding the interests of the Treasury; . . . .

II. There is no impairment of the provisions in the national laws of the contracting States conferring a lien upon public insurance associations in respect of claims arising out of the personnel of vessels.

It is Article 2(2)—"Claims arising out of the contract of engagement of the . . . crew"—on which Tesoreria General chiefly relies, arguing that the provision's broad scope encompasses all forms of renumeration attributable to the labor of the crew, including social security contributions withheld from a seaman's pay but not remitted to the proper governmental agency. Tesoreria General reads this provision to include social security contributions arguing that, if the drafters had intended to limit Article 2(2)'s coverage only to those sums payable directly to seamen, they would have chosen more restrictive language. Tesoreria General concludes that *any claim* for which the employer/vessel owner is liable as a result of its contract of employment with a seaman, including nonpayment of social security contributions, is a claim contemplated by Article 2(2). Semantically, then Tesoreria General equates social security contributions with wages and other forms of compensation.

BCI, unsurprisingly, takes a narrower view. It argues that Article 2(2) does not encompass social security contributions, and the Protocol of Signature's provisions make this evident because it leaves undisturbed the right of signatory countries to enact national legislation "conferring a lien upon public insurance associations in respect of claims arising out of the insurance of the personnel of vessels." BCI argues that since Protocol II anticipates that signatory nations have, or may adopt, specific legislation to create liens for public insurance contributions, any notion that the 1926 Convention itself creates such a lien is negated. We believe this view is correct.

In countries which recognize that unpaid social insurance contributions create a preferred maritime lien, specific legislation has been adopted. *See* International Maritime Organization United Nations Conference on Trade and Development, "Consideration of Maritime Liens and Mortgages and Related Subjects, in Accordance with the

Terms of Reference of the Joint Intergovernmental Group," U.N. Doc. TD/B/C.4/AC.8/6 (April 9, 1987).[14]

The JIGE IMO/UNCTAD report lists fifty-two countries and identifies the various maritime liens each recognizes by national legislation. Only twelve of those countries listed recognize a lien for social security contributions. Of the twenty-one listed countries that are also parties to the 1926 Brussels Convention, only three (Belgium, France, and Italy) recognize a lien for social security contributions. Furthermore, the explanatory appendix to the table of countries discusses "wages" and "social insurance contributions" in separate sections:

> *Wages*
>
> Wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel (article 4, paragraph 1(i) of the 1967 Convention, and of the CMI Lisbon Draft; *see also article 2, paragraph 2 of the 1926 Convention*).
>
> *Social insurance contributions*
>
> Social insurance contributions payable on behalf of the master, officers and other members of the vessels complement (article 4, paragraph 1(i) CMI Lisbon Draft).

(Emphasis added). The JIGE's report indicates that the 1967 Convention and the 1926 version indisputably pro-

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[14] This Report was written by the Joint Intergovernmental Group of Experts (JIGE) on Maritime Liens and Mortgages and Related Subjects, a cooperative comprised of representatives from the United Nations Conference on Trade and Development (UNCTAD), and the International Maritime Organization (IMO). The cited work is partially contained in the record. Case No. 91-3922 R. vol. 5, at 1582-85. However, the record did not contain the full report—an explanatory appendix was omitted. This appendix was included in the Record Excerpts presented to this Court on appeal. Per Fed.R.Civ.P. 44.1, we are able to consider this material.

vide that wage claims give rise to maritime liens. Note that the section on wages makes reference to *both* the 1926 and the 1967 Conventions. No reference to either Convention is made in the section dealing with social insurance contributions. Reference is made only to the "Lisbon Draft", and not to any Convention currently in force. We conclude that this indicates that the IMO/UNCTAD intergovernmental group of experts did not consider that social insurance contributions are entitled to a lien under either the 1926 or the 1967 Brussels Convention.

One of the main points of error raised by Tesoreria General on appeal is that the district court erred in relying on the JIGE report. The JIGE, *see supra*, note 14, was involved in harmonizing differences between the 1926 Brussels Convention and the 1967 Brussels Convention, which also dealt with the unification of rules relating to maritime liens and mortgages.[15] The 1967 Convention's position on liens for social security contributions appears to be narrower than that of its predecessor. Under the 1967 Convention, liens are granted to "wages and other sums due to the master, officers and other members of the vessels complement in respect of their employment on the vessel[.]" 1967 Brussels Convention, art. 4(1)(i) (*reprinted in* 6A *Benedict on Admiralty* 8-25 (7th ed. 1993)). The phrasing of this provision ("sums due to the master . . . ."), grants a lien only if money is owed directly to a crewmember, and not to a third party on the crewmember's behalf. *See* William Tetley, *Maritime Liens and Claims* 128-29 (1985).

The JIGE was dealing with two divergent provisions on social insurance contributions, and Tesoreria General maintains that the resulting IMO/UNCTAD report was speaking only to the narrower provisions of the 1967 Brussels Convention, of which Spain is not a party. Con-

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[15] Spain is not a party to the 1967 Brussels Convention.

sequently, Tesoreria General argues, the district court's decision was based upon inapplicable information. We conclude that the report, while discussing two different international conventions, clearly distinguishes between the two agreements.[16]

B. *French Legislation*

Our interpretation of Spanish law, vis-a-vis the 1926 Brussels Convention, is also guided by looking to the actions of other signatory nations.[17] Protocol II of the 1926 Convention preserved the right of signatory states to enact legislation regarding liens for contributions due to public insurance associations. French law is illustrative on this point, as France has adopted specific legislation on the lien status accorded social security contributions. *See* Case No. 91-3922 R. vol. 6, at 1790-91 (Affidavit of Patrick Thieffry). In fact, France has adopted the language of Article 2(2) almost verbatim.

Tesoreria General argues that by adopting the language of Article 2(2), French law demonstrates that the 1926 Convention itself creates a maritime lien for social security contributions. Tesoreria General further contends that we should infer that by assimilating the language of Article 2(2) wholesale, France's actions illustrate that a signatory country need not enact its own distinctly worded legislation conferring privileged status to a lien for unpaid social insurance contributions. We are not persuaded by this reasoning.

France has enacted specific legislation on this matter, while Spain's legislature did not address this issue until

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[16] Interestingly, although Tesoreria General paints the work of the IMO/UNCTAD group of experts in a disparaging light, the work of this group was cited favorably by Tesoreria General in their Supplemental Memorandum in Opposition to BCI's Motion for Partial Summary Judgment. *See* Case No. 91-3922 R. vol. 5, at 1476.

[17] We have been referred to no Spanish judicial decisions interpreting Article 2(2) of the 1926 Brussels Convention.

recently.[18] Whatever the wording of the French law, the simple fact that France deemed it necessary to legislatively create a lien for unpaid social security contributions illustrates that such legislative action was necessary under the terms of the 1926 Convention. We believe that this supports the conclusion that the 1926 Convention, standing on its own, does not give rise to the preferred lienholder status that Tesoreria General now seeks.

C. *Spain's Internal Legislation*

Turning to a review of Spain's internal law, Tesoreria General argues that Spain grants a "super privilege" to unpaid social security contributions, and that a Spanish court, *if* called upon to extend this privilege in a maritime context, would certainly do so. The affidavit of Professor J.L. Rodriguez Carrion was offered by Tesoreria General in support of this position. This affidavit, however, is at best inconclusive. Rodriguez Carrion has drawn an analogy between statutes according preferential treatment for social security payments and laws which provide this status for tax debts. *See* Case No. 91-3922 R. vol. 6, at 1824 (Affidavit of Professor J.L. Rodriguez Carrion). Equating delinquent tax payments with unpaid social security contributions undermines Tesoreria General's efforts to characterize its claim as equivalent to one for "wages."

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[18] The Rodriguez Carrion affidavit, discussing a recently passed Spanish statute, states: "Thanks to this new drafting, payments due to Social Security are equivalent to those taxes owed to the province or municipality . . . ." Later, the affidavit observes that "[i]t is lamentable that neither the Spanish legislature nor our Supreme Court, has spoken on the ranking of Social Security contribution credits with relation to the privileged credits of Article 2 of the Brussels Convention of 1926." *See* Case No. 91-3922 R. vol. 6, at 1824 (Affidavit of Professor J.L. Rodriguez Carrion).

IV. *Digression Into the Familiar*

When the parties have failed to conclusively establish foreign law, a court is entitled to look to its own forum's law in order to fill in any gaps. *See Cantieri Navali Riuniti v. M/V SKYPTRON*, 802 F.2d 160:

> This practice has been approved by this Circuit and by leading commentators on choice of law. In *Symonette Shipyards Ltd. v. Clark*, 365 F.2d 464, 468 (5th Cir. 1966), we noted that "[i]n the absence of sufficient proof to establish with reasonable certainty the substance of the foreign principles of law, the modern view is that the law of the forum should be applied." Professors Scoles and Hay adopt a similar view in their treatise. E. Scott and P. Hay, Conflict of Laws § 12.19 (1982) ("[I]t is better to abandon the terminology of presumption and simply say that where foreign law is not proved the court applies . . . local law.").

Id. at 163 n. 5. In the instant case we need not turn to American maritime law as a substantive device because we hold that the 1926 Brussels Convention, as the applicable law of Spain, does not create a lien (preferred or otherwise) for unpaid social security contributions. American maritime law, however, provides a background against which we can analyze Tesoreria General's attempts to characterize its claim for unpaid social security contributions as one for "wages."

Many of the American cases in which parties, other than seamen, seek to assert a "wage" lien involve employer contributions to employee benefit plans. *See, e.g., Citibank, N.A. v. M/V AMERICAN MAINE*, 865 F.2d 24, 28 (2nd Cir.1988); *West Winds, Inc. v. M/V RESOLUTE*, 720 F.2d 1097, 1100-01 (9th Cir.1983), *cert. denied*, 467 U.S. 1242, 104 S.Ct. 3513, 82 L.Ed.2d 822 (1984); *Barnouw v. S.S. OZARK*, 304 F.2d 717, 719-20 (5th Cir.), *cert. denied*, 371 U.S. 923, 83 S.Ct. 291,

9 L.Ed.2d 291 (1962) Uniformly, American courts have denied liens equivalent to the wage lien to nonseamen asserting such claims: "Every published opinion addressing employer contributions to pension-type benefit plans . . . has concluded that such contributions are not 'wages of the crew'." *Prudential Ins. v. U.S. Lines, Inc.*, 915 F2d 411, 412 (9th Cir.1990).

At the heart of these decisions is the insurmountable obstacle that Tesoreria General cannot overcome, under Spanish or American maritime law. Unpaid social insurance or pension contributions are not "wages of the crew" because they are due to a third party vicariously through the seamen's labors; the seamen themselves have no claim to their employer's contributions. *See Prudential Ins.*, 915 F.2d at 412; *M/V AMERICAN MAINE*, 865 F.2d at 28; *Long Island Tankers Corp. v. S.S. KAIMANA*, 265 F.Supp. 723, 726 (N.D.Cal1967), *aff'd*, 401 F.2d 182 (9th Cir.1968), *cert. denied*, 393 U.S. 1095, 89 S.Ct. 879, 21 L.Ed.2d 785 (1969).

The District Court of Alaska recently reiterated the cogency of this reasoning. *See Kesselring v. F/T ARCTIC HERO*, 1993 AMC 447, 1992 WL 470510 (D.Alaska 1993). In *Kesselring*, the United States Government argued that unpaid withholding taxes taken from the crew's pay created a maritime lien for crew wages in the Government's favor. The court termed this effort "bootstrapping," and held: "There is no case law or other authority supporting the proposition that crew wages encompasses uncollected taxes from monies withheld by an employer." *Id.* at 448.

Under *West Winds, Inc. v. M/V RESOLUTE*, *supra*, and *Long Island Tankers Corp. v. S.S. KAIMANA*, *supra*, if the seamen can establish a right to an immediate dispersal of benefits, or have suffered a net loss because of their employers' failure to contribute to a benefits plan, a wage lien may lie. *See West Winds, Inc. v. M/V RESOLUTE*, 720 F.2d at 1099; *Long Island Tankers*

Corp. v. S.S. KAIMANA, 265 F.Supp. at 726-27. This reasoning could extend to the instant case and might create a lien in Tesoreria General's favor if the crewmembers were personally liable for the unpaid social insurance contributions. Such is not the case here, as Spain's Social Security Law art. 68 § 2 provides that if a deduction is made but not remitted, the employer is exclusively liable for remitting the total contribution.[19]

V. *Adequate Time for Discovery*

We next address Tesoreria General's claim that the district court abused its discretion in ruling on BCI's motion for summary judgment without affording Tesoreria General adequate time for discovery. A review of the time-frame in which the events of this case transpired convinces us that the district court did not abuse its discretion.

This matter was originally in two districts—the Southern District of Texas at Houston, and the Eastern District of Louisiana at New Orleans. The cases were consolidated in the New Orleans forum in January 1991. Tesoreria General had filed its intervention request in Sep-

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[19] If the seamen were personally liable for the unpaid social security contributions, Tesoreria General may have been entitled to a lien against the sale proceeds. This reasoning comports with the IMO/UNCTAD JIGE's report on harmonizing the Brussels Conventions: "[C]ontributions due by the master and crew and deducted by the owner but not paid and which, consequently, *is claimed by the social insurance institution directly from the master and the crew*[,]" would give rise to a maritime lien against a vessel. "Revision of the International Conventions for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, Final Report of the Chairman of the International Sub-Committee," *reprinted in* Case No. 91-3922 R. vol. 5, at 1478 (Tesoreria General's Supplemental Memorandum in Opposition to BCI's Motion for Partial Summary Judgment) (emphasis added). Since Tesoreria General cannot recover funds directly from the seamen, there is no basis to impose a lien against the sale proceeds to prevent out-of-pocket losses to the crew.

tember of 1990, shortly before BCI filed its original motion for summary judgment. BCI's motion was stayed indefinitely, but BCI renewed it in February of 1991, after the cases were consolidated. A hearing was set for March 20, 1991. Tesoreria General opposed the resetting of the summary judgment hearing, claiming there was inadequate time for discovery; however, no Federal Rule Civil Procedure 56(f) affidavit, setting forth what additional discovery was necessary, accompanied Tesoreria General's opposing motion.[20] After the March 20, 1991 hearing, the district court twice requested additional briefing on the lien ranking issue. The district court issued its ruling on lien status in July 1991, and a Federal Rule Civil Procedure 58 judgment was entered on August 1, 1991.

From the time that it filed an intervention request to the March 1991 hearing on BCI's summary judgment motion, Tesoreria General had over seven months within which to conduct discovery. Granted, the outbreak of the Persian Gulf conflict during this same period made international travel inadvisable. Nevertheless, Tesoreria General, an agency of the Spanish government, was in the unique position of having access to all manner of authorities on Spanish law. Counsel should have been able to coordinate necessary discovery by telephone, facsimile transmissions, and the mails. In-person preparation, while surely preferable to alternative means, was not the only manner in which discovery could have proceeded. No such effort was apparently made.

Rule 56 contemplates that the parties will be afforded *adequate time* to conduct necessary discovery; "This is a very different animal from 'adequate discovery.'" *Union*

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[20] *See Celotex Corp. v. Catrett*, 477 U.S. 317, 326, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986) (Rule 56(f) is appropriate mechanism to deal with premature summary judgment motion); *accord Union City Barge Line, Inc. v. Union Carbide Corp.*, 823 F.2d 129, 138 n. 21 (5th Cir.1987).

City Barge Line, Inc. v. Union Carbide Corp., 823 F.2d 129, 138 n. 21 (5th Cir.1987). No Federal Rule Civil Procedure 56(f) motions were presented to the court which could have illustrated what discovery Tesoreria General felt was necessary to refute BCI's motion for summary judgment. *See id.* at 137 (Federal Rule Civil Procedure 56(f) is "tailor-made" for such situations). The district court did not abuse its discretion in hearing BCI's motion.

VI. *Summary Judgment*

We will affirm a grant of summary judgment "where 'we are convinced, after an independent review of the record, that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.' " *Hartford Acc. & Indem. v. Costa Lines Cargo Serv.*, 903 F.2d 352, 362 (5th Cir.1990) (quoting *Brooks, Tarlton, Gilbert, Douglas & Kressler v. United States*, 832 F.2d 1358, 1364 (5th Cir.1987)) (internal citations omitted). The necessity of shifting through foreign law does not mitigate against the use of summary proceedings:

> This conclusion seems obvious in light of Rule 44.1's mandate that such a determination "shall be treated as a ruling on a question of law." Thus, even differences of opinion on the content, applicability, or interpretation of the foreign provision may not be characterized as a "genuine issue as to any material fact" under Rule 56.

John R. Brown, "44.1 Ways to Prove Foreign Law," 9 *Mar.Law.* 179, 194 (1984).

VII. *Conclusion*

Despite the differing interpretations of Spanish law offered by the parties, we conclude that the 1926 Brussels Convention does not create a maritime lien for unpaid social security contributions. Furthermore, the district

court did not abuse its discretion in the conduct of the proceedings; adequate time for discovery was provided.

The crewmen's intervention request was properly denied. The crewmembers, through their representative Union, assigned their wage claims to BCI by virtue of the January 1991 agreement. Lacking any interest relating to the sale proceeds, which formed the basis of the present action, the crewmembers cannot intervene of right under Rule 24(a)(2).

The judgment of the district court is, therefore, AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 90-2376 c/w
90-2411, 90-2716 and 19-386

SECTION "D" (1)

PARCEL TANKERS, INC.

versus

STOLT LUISA PANDO MT, *et al.*

MINUTE ENTRY

[Date of Entry July 25, 1991]

Before the court is the Motion of Plaintiff, Banco De Credito Industrial, S.A., formerly Banco De Credito A La Construccion, S.A. ("BCI") for Partial Summary Judgment as to the ranking of the various claims asserted against the two vessels in this consolidated action. Various parties to these actions have submitted memoranda in opposition to this motion.

BCI's original Motion moved for Partial Summary Judgment as to (1) the validity of BCI's first preferred mortgage lien and (2) the ranking of the various claims asserted against the M/T STOLT LUISA PANDO. Subsequent to the filing of this motion, the action involving the M/T STOLT MARIA PANDO, originally filed in the U.S. District Court in Houston, was consolidated with the action before this court. BCI had filed a similar Motion for Summary Judgment in the Houston court which is also before this court. In an Order entered April 1,

1991, this court granted Summary Judgment in favor of BCI, and held that BCI's first preferred mortgage lien on the M/T STOLT LUISA PANDO and M/T STOLT MARIA PANDO were "preferred mortgages" as provided in 46 U.S.C. § 31301(6)(B). Thus, the question remaining before this court is whether the issue of the ranking of the various claims asserted against the two vessels is ripe for summary judgment.

Rule 56 of the Federal Rules of Civil of [sic] Procedure states that when no issue of material fact exists and movers are entitled to judgment as a matter of law, summary judgment may be granted. Fed. R. Civ. P. 56. The standard followed is not whether "a mere existence of [an] alleged factual dispute [exists]," but whether a material fact defined by substantive law that will affect the outcome of the suit is in dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). No issue will be considered to exist however unless sufficient evidence is presented in favor of the non-moving party on which a jury could return a verdict for it. *Id.* Therefore, sufficient evidence supporting the claimed factual dispute must be shown, and the non-moving party must set forth specific facts to claim there is an issue for trial. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289 (1968). If the evidence is merely colorable or not significantly probative, summary judgment may be granted.

The parties opposed to BCI's motion have not alleged any substantive issues of fact. They merely allege that the motion is premature because additional discovery as to the facts and the controlling law is needed. The Fifth Circuit has held that "the complaining party is required to do something more than state that discovery might reveal something of which [it was] not aware." *Hartford Accident & Indemnity Co. v. Costa Lines Cargo Services, Inc.*, 903 F.2d 352 (5th Cir. 1990) (citations omitted). The parties to this action have been given numerous opportunities and extensions of time in which to conduct

additional discovery and present additional briefs as to the applicable law. Even after conducting substantial discovery, the parties have presented no substantive factual disputes and the controlling law is clear to this court, thus, the dispute between the parties is a question of law for the court to decide.

These consolidated cases involve the arrest of two vessels pursuant to actions brought in a United States District Court to enforce a Spanish preferred ship mortgage. Various claimants have intervened in both cases to assert claims allegedly arising from transactions taking place in the United States, Spain, Portugal, the Netherlands, and other foreign jurisdictions. (Although various claims have been filed, the court limits its analysis to the claims of Tesoreria General de la Seguridad Social de Espana ("Tesoreria General") and Kopcke Holland B.V. ("Kopcke") as they are the only intervenors who claim that their lien primes that of BCI.) In determining the proper ranking of the various liens asserted against the vessels the court is faced with two issues: (1) what law is applicable in ranking the liens, and (2) what law is applicable to determine the validity and the classification of the various liens.

The first issue the court must address is what law is applicable in determining the proper ranking of the liens —the law of Spain or the law of the United States. The court recognizes that the general rule in determining the validity of the mortgage is to look to the law of the country where the mortgage was contracted. However, in ranking liens, the Fifth Circuit has held that the court must use the law of the country where the seizure took place. In *Brandon v. Denton*, 302 F.2d 404 (1962), the court recognized the rule established by Judge Brown in *The Scotia*:

> Liens and privileges, when enforced in other countries than in those by whose laws they are created, are largely treated as remedies; and, unless affecting

> foreigners alone, take rank according to the law of the forum.

The Scotia, 280 F. 927 (S.D.N.Y. 1888). The court also looked to the earlier case of *Harrison v. Sterry*, 9 U.S. (5 Cranch) 289 (1809), in which Chief Justice Marshall stated the following rule:

> The law of the place where a contract is made is, generally speaking, the law of the contract, i.e., it is the law by which the contract is expounded. But the right of priority forms no part of the contract itself. It is intrinsic, and is rather a personal privilege, dependent on the law of the place where the property lies, and where the court sits which is to decide the case.

Harrison, 9 U.S. at 298. The Fifth Circuit held that this general rule also applies in a maritime context, and that the validity of a maritime lien is considered in light of the law of the place where the lien arose, while ranking is determined by the law of the forum. *Morgan Guaranty Trust Co. v. M/V GRIGORIOS C. IV*, 615 F. Supp. 1444, 1454 (E.D. La. 1985), citing *Brandon*, 302 F.2d at 411. This principle is well recognized in the United States. *See* Tetley, *Maritime Liens and Claims*, at 531 (1985); G. Gilmore and C. Black, *The Law of Admiralty*, at 701 (2d ed. 1975).

The court recognizes that in the jurisprudence holding that United States law is applicable when determining the ranking of liens against a vessel seized in the United States, regardless of the nationality of the vessel and the various claims against it, a claim by an American interest was always present. These cases generally arose when an American interest seized a vessel, foreign interests intervened, and the court was required to determine what law was applicable for determining the ranking of the various claims. The present case differs from this jurisprudence in that a Spanish interest seized the vessel and various interests, foreign and American, intervened. The Ameri-

can interests that intervened are relatively insignificant in amount compared to the claims of BCI and Tesoreria General, but the court finds that these interest [sic] combined with the claim of the U.S. Marshal's office dictate that United States law be applied in determining the ranking of the claims asserted against the vessel.

The second issue the court will address is what law is applicable to determine the validity and the substantive status of the various liens. The lien that this court is primarily concerned with is the lien asserted by Tesoreria General for sums owed by the owner of the vessels to the Tesoreria General, a division of the Spanish Social Security System, pursuant to Spanish law. The court must decide whether the lien asserted by Tesoreria General is included in the same preferred category and enjoys the same substantive status as claims for crew wages.

Under a conflict of law analysis, the validity and substantive status of a maritime lien is considered in light of the law of the place where the lien arose. *Morgan Guaranty Trust Co. v. M/V GRIGORIOS C. IV*, 615 F. Supp. 1444, 1454 (E.D. La. 1985); *Brandon v. Denton*, 302 F.2d 404 (5th Cir. 1962). The lien asserted by Tesoreria General was created under Spanish law; thus, the court must decide whether Spanish law holds that a claim for social security contributions gives rise to a preferred maritime lien, similar to a claim for crew wages, that would prime the lien of BCI. If Spanish law recognizes Tesoreria General's claim as giving rise to a preferred maritime lien of the same substantive status as crew wages, then U.S. courts are bound to recognize it as such and must rank the lien according to this characterization.

After reviewing the conflicting statements of the experts of BCI and Tesoreria, and the reports of the Comite Maritime International and the Joint UNCTAD/IMO Intergovernmental Group of Experts on Maritime Liens and Mortgages and Related Subjects, the court concludes that

neither the Brussels Convention of 1926, of which Spain is a signatory, nor the law of Spain confer a preferred maritime lien, similar to a claim for wages, to the claims of Tesoreria General. In reaching its conclusions, the court disregarded the conflicting affidavits of Sr. Ruiz, Sr. Vinal and Sr. Alcaraz because of the lack of supporting documentation for their opinions. The court was convinced by the reports mentioned above that although consideration is being given to future amendments of the 1926 and 1967 Brussels Conventions which would allow claims for social insurance contributions to assert a maritime lien in the same category as a claim for wages, the 1926 Brussels Convention as presently worded does not recognize Tesoreria General's claim as a preferred maritime lien against the vessels. The allegations of the experts that Spain may or may not agree to a future amendment of the Convention is of no significance.

The court further finds that the claims by Kopcke would not have priority over the claims of BCI. Even assuming Kopcke's claim would meet the criteria of "necessaries" under 46 U.S.C. § 31301, it would not meet the criteria of a "preferred maritime lien" since it arose after BCI's preferred mortgage, and the necessaries in question were provided outside the United States. *See* 46 U.S.C. § 31301(5)(A) and 46 U.S.C. § 31326(b)(2). The only claims that this court finds have priority over the claims of BCI are: (1) the custodia legis expenses—to include the expenses of the U.S. Marshal's office in arresting, storing and selling both vessels, and the claims of SAAB for necessaries supplied to the M/V STOLT MARIA PANDO after arrest of the vessel, and (2) the claims of Gulf Maritime—the U.S. supplier who supplied necessaries to the M/V STOLT MARIA PANDO while docked in Houston in March 1990. BCI's first preferred mortgage lien on the vessels has priority over all other claims asserted by the intervenors; thus, the court finds the ranking of these claims is unnecessary.

The court further orders that counsel for BCI submit a proposed judgment to the court no later than Wednesday, July 31, 1991.

* * * *

/s/ J. McNamara

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 90-2376 c/w 90-2411,
90-2716, and 91-386

SECTION "D" (1)

PARCEL TANKERS, INC.

versus

STOLT LUISA PANDO MT. *et al.*

JUDGMENT

[Date of Entry August 1, 1991]

Considering the motion of plaintiff, Banco de Credito Industrial, S.A., formerly Banco de Credito a la Construccion, S.A. ("BCI"), for partial summary judgment as to (1) the validity of BCI's first preferred mortgage lien on the M/T STOLT LUISA PANDO and M/T STOLT MARIA PANDO, and (2) the ranking of the various claims asserted against the vessels in this consolidated action (except the cargo claims of Woodhouse, Drake & Carey, Ltd., et al.), the memoranda and supplemental memoranda filed by the parties herein, the documentary evidence before the Court, and after having heard argument from counsel at the hearing held on March 20, 1991, and considering the Court's Order of April 1, 1991 and Minute Entry of July 25, 1991.

IT IS HEREBY ADJUDGED, ORDERED AND DECREED that plaintiff's motion for summary judgment is

GRANTED and BCI's first preferred mortgage lien on the M/T STOLT LUISA PANDO and M/T STOLT MARIA PANDO are held to be "preferred mortgages" as provided in 46 U.S.C. § 31301(6)(B).

IT IS FURTHER ADJUDGED, ORDERED AND DECREED that the only claims having priority over BCI's first preferred mortgage lien on the M/T STOLT LUISA PANDO and M/T STOLT MARIA PANDO are: (1) the custodia legis expenses—to include the expenses of the U.S. Marshal's office in arresting, storing and selling both vessels, and the claim of Saab Tank Control, a division of Saab Systems, Inc., for necessaries supplied to the M/T STOLT MARIA PANDO at Houston after arrest of the vessel, and (2) the claim of Gulf Maritime Services, Inc.—the U.S. supplier which supplied necessaries to the M/T STOLT MARIA PANDO while docked at Houston in March 1990.

IT IS FURTHER ADJUDGED, ORDERED AND DECREED that BCI's first preferred mortgage lien on the M/T STOLT LUISA PANDO and M/T STOLT MARIA PANDO have priority over all other claims asserted by the intervenors; thus, the Court finds the ranking of these claims is unnecessary. However, the Court does not rule on the ranking of the cargo claims of Woodhouse, Drake & Carey, Ltd., et al. against the M/T STOLT LUISA PANDO and M/T STOLT MARIA PANDO inasmuch as their ranking was not requested in plaintiff's motion for partial summary judgment.

New Orleans, Louisiana, this 31 day of July, 1991.

/s/ J. McNamara
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 90-2376 c/w
90-2411, 90-2716 and 91-386

SECTION "D" (1)

PARCEL TANKERS, INC., *et al.*

versus

M/T STOLT LUISA PANDO, *et al.*

MINUTE ENTRY

[Date of Entry September 30, 1991]

Before the court is Tesoreria General de la Seguridad Social's Motion for New Trial and/or to Alter or Amend Summary Judgment, which is opposed by Banco de Credito Industrial, S.A. The motion is before the court on briefs, without oral argument.

After due consideration of the memoranda of counsel and the applicable law, IT IS ORDERED that the Motion for New Trial and/or to Alter or Amend Summary Judgment is hereby DENIED.

* * * *

/s/ J. McNamara

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-3922
C/W 92-3100 & 92-3298

BANCO DE CREDITO INDUSTRIAL, SA,
Plaintiff-Appellee,

versus

TESORERIA GENERAL DE LA,
Intervenor-Appellant,

versus

STOLT LUISA PANDO, MT,
Defendants.

PARCEL TANKER, INC.,
Plaintiff,

and

BANCO DE CREDITO INDUSTRIAL, SA,
Plaintiff-Appellee,

versus

TESORERIA GENERAL DE LA,
Intervenor-Appellant,

versus

STOLT LUISA PANDO MT., *et al.*,
Defendants.

WOODHOUSE DRAKE & CARRY, LTD.,
Plaintiff,

and

BANCO DE CREDITO INDUSTRIAL, SA,
Plaintiff-Appellee,

versus

TESORERIA GENERAL DE LA,
Intervenor-Appellant,

STOLT LUISA PANDO MT.,
Defendant.

BANCO DE CREDITO INDUSTRIAL, SA,
Plaintiff-Appellee,

versus

TESORERIA GENERAL DE LA,
Intervenor-Appellant,

versus

M/T STOLT MARIA PANDO, *in rem, et al.,*
Defendants.

Appeals from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING

(July 19, 1993)

Before DUHÉ and BARKSDALE, Circuit Judges, and HUNTER,* District Judge.

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* Senior District Judge of the Western District of Louisiana, sitting by designation.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ John M. Duhé, Jr.
United States Circuit Judge

APPENDIX F

TRANSLATION

MINISTRY OF TRANSPORTATION,
TOURISM AND COMMUNICATIONS

GENERAL OFFICE OF THE MERCHANT MARINE

In answer to your fax of March 21, 1991, I am pleased to report the following aspects:

FIRST

Spain is a signatory of the Brussels Convention of 1926, ratified on June 2, 1930 (Official Gazzete No. 212 of July 31).

SECOND

The position of the Spanish Administration, in accordance with International Conventions and the law in force, defends the need of maintaining the primacy of the social interest upon economic interests. In this regard the contributions to the Spanish Sequridad Social System have to have privileged credit nature since they directly affect future benefit payments of the workers and affect their legitimate rights with preference over other credits that might exist, namely the bank credits, in this case the credits that Banco de Credito Industrial might have.

THIRD

Moreover, the questionnaire from which it is shown that Spain shows its refusal to include among the maritime privilege the Sequridad Social's quotas, cannot be taken into account as the official position of The Spanish Administration, since it is a document issued by The International Maritime Committee, an organization that, despite its known reputation, is private in nature and to

which Spain is a member through The Spanish Maritime Association, also private in nature, and whose decisions and proposals never prejudice the political positions that our country might have in international forums.

This official announcement, which has an urgent character, can be extended if you request so, in order to appreciate the controversy at issue in its just measure.

Respectfully,

Signed:

Jose Antonio Cruz Ruiz

Certification of the Translation

I hereby certify that this is a true and accurate translation of the original document in Spanish.

/s/ Ileana Arias
ILEANA ARIAS
Attorney at Law

SWORN TO AND SUBSCRIBED BEFORE ME THIS 22nd DAY OF MARCH, 1991.

/s/ Mark Gundlach
Notary Public

[SEAL]

MINISTERIO DE TRANSPORTES,
TURISMO Y COMUNICACIONES

DIRECCION GENERAL DE LA MARINA MERCANTE

EN CONTESTACION A SU TELECOPIA DE 21 DE MARZO DE 1991 ME COMPLACE COMUNICARLE LAS SIGUIENTES PUNTUALIZACIONES:

PRIMERA.

ESPAÑA ES SIGNATARIA DE LA CONVENCION DE BRUSELAS DE 1926. RATIFICADA EL 2—DE JUNIO DE 1930 (CACETA N. 212 DE 31 DE JULIO).

SEGUNDA.

LA POSICION DE LA ADMINISTRACION ESPAÑOLA EN CUMPLIMIENTO DE LOS CONVENIOS INTERNACIONALES Y DE LA LEGISLACION VIGENTE DEFIENDE LA NECESIDAD DE MANTENER LA PRIMACIA DE LOS INTERESES SOCIALES SOBRE LOS ECONOMICOS. EN ESTEORDEN DE IDEAS, DEBEN TENER EL CARACTER DE CREDITOS PRIVILEGADOS LAS COTIZACIONES A LA SEGURIDAD SOCIAL ESPAÑOLA YA QUE AFECTAN DIRECTAMENTE A PRESTACIONES FUTURAS DE LOS TRABAJADORES E INCIDEN EN SUS LECITIMOS DERECHOSCON PREFERENCIA EN LA PRELACION DE OTROS CREDITOS QUE PUDIERAN EXISTIR,—SEÑALADAMENTE LOS BANCARLOS EN ESTE CASO LOS CREDITOS QUE PUDIERA TENER EL BANCO DE CREDITO INDUSTRIAL.

TERCERA.

A MAYOR ABUNDAMIENTO, EL CUESTIONARIO EN EL QUE SE RECOCE QUE ESPAÑA MUESTRA SU NEGATIVA A QUE SE INCLUYAN ENTRE LOS

PRIVILEGIOS MARITIMOS LAS CUOTAS A—LA SEGURIDAD SOCIAL, NO PUEDE SER TENIDO EN CUENTA COMO POSTURA OFICIAL DE—LA ADMINISTRACION ESPAÑOLA, YA QUE SE TRATA DE UN DOCUMENTO ELABORADO POR EL COMITE MARITIMO INTERNACIONAL, ORCANISMO QUE AUNQUE DE RECONOCIDO PRESTIGIO, ES DE CARACTER PRIVADO Y EN EL QUE ESPAÑA ESTA PRESENTE A TRAVES DE LA ASOCIACION ESPAÑOLA DE DERECHO MARITIMO TAMBIEN DE CARACTER PRIVADO, Y CUYAS DE CIONES Y PROPUESTAS EN NINGUN CASO PREJUZGAN LAS POSICIONES POLITICAS QUE—NUESTRO PAIS PUDIERA MANTENER EN FOROS INTERNACIONALES.

EL PRESENTE COMUNICADO QUE TIENE CARACTER DE URGENCIA PUDIERA AMPLIARSE SI VDS. LO SOLICITARON A LOS EFECTOS DE APRECIAR LA CONTROVERSIA PLANTEADA EN SU JUSTA MEDIDA.

ATENTAMENTE.

/s/ Jose Antonio Cruz Ruiz
JOSE ANTIONIO CRUZ RUIZ

APPENDIX G

TRANSLATION

Ministry of
Public Works and Transportation
Office of the General Secretary of Transportation Services

GENERAL DIRECTORATE OF THE MERCHANT MARINE

Re: Banco de Credito Industrial, S.A. v.
M/T STOLT LUISA PANDO

SUBJECT: 1926 Brussels Conventions on Maritime Liens And Mortgages

In reference to the question raised with respect to whether the social security contributions are included in the concept of credits of Article 2.2 of the 1926 Brussels Convention, this General Directorate affirms that its interpretation since the named Convention came into force was that the contributions are included.

The 1926 Brussels Conventions is a part of our legal system and is of direct application as an internal law once published in the State's Official Bulletin which means that it is not necessary to promulgate any other rule of law for its incorporation or development.

The express mention of the social security contribution as a maritime credit giving rise to a lien, in Article 4.1(1) of the Convention on Maritime Liens and Mortgages adopted in Geneva at the beginning of May of 1993, should not be interpreted as implying that the prior Brussels Convention of 1926 did not incorporate the social security contributions as a maritime credit giving rise to a lien.

In the debates that were held in the Joint Intergovernmental Group UNCTAD/OMI, during the preparatory

meetings of the project of convention recently adopted, the delegations agreed with the aforementioned interpretation. This is so given that there were statements of several delegations to the effect that they did not consider necessary such express reference to social security contributions, since the reference to salaries and other amounts owed to the Captain and crew was sufficient, which means that the payment of social security contributions qualifies as *other amounts owed* to the Captain and crew; however, it was decided to leave the reference to social security contributions explicit in order to clear any doubts that could originate (See paragraph 20 of document JIGE (II)/3 ATTACHED to the REPORT corresponding to the second set of sessions of the Joint Intergovernmental Group of Experts on Maritime liens, Maneuvers and Mortgages that took place in London between May 11 and 15, 1987).

Spain's support of this interpretation is evident, as it is Article 2.2 of the Brussels Convention of 1926, as an example of the wide interpretation of the text we cite the debates had in Geneva during the celebration in 1993 of the Diplomatic Conference where Spain proposed an express inclusion of the dismissal indemnifications to which the crew would be entitled, the same not being accepted because the different delegations that were present understood that the doubts raised by [not] including these indemnifications for discharge were inferior to [those of] the Social Security so as to include it with an express reference, given that too many express references have a contrary effect to that desired because anything not expressed would have to be understood as not included.

Madrid, June 12, 1993

The General Director

[signed] Raphael Lobeto Lobo

APPENDIX H

SWORN STATEMENT

JOSE LUIS RODRIGUEZ CARRION

1. I was born on February 10, 1936. In March, 1961, I obtained my license as an officer of the Spanish Merchant Marine and in July, 1968, I was granted my masters license; I sailed non-interrupted, from 1958 through 1977, as a Steward, Third, Second, First Officer and Captain, on vessels of Ghana, Israel and Holland flags. I obtained a degree in law from the University of Granada in 1978. In 1979, I became a professor of admiralty law at the University of Cadiz, obtaining the degree of Doctor in Commercial Law from the Autonomous University of Barcelona in 1989. I am a practicing attorney in admiralty law since 1979. I have given many conferences and seminars and I have written many articles concerning different issues on admiralty law. I am the author of the article, "Revision of the International Conventions on Maritime Liens and Mortgages, and Vessel Attachment," and "Fraud in Marine Mortgages and Liens."

Currently, I am preparing a book on marine insurance and another on the new Salvage Agreement of 1989. I am Spain's representative before the United Nations (I.M.O. and U.N.C.T.A.D) and I have attended many of their conferences on maritime issues I have just received the "First Prize of the Spanish Magazine of Insurance," for an investigative paper on marine insurance.

2. The firm CHAFFE, McCALL, PHILLIPS, TOLER & SARPY, of New Orleans, has requested a legal opinion with relation to the ranking of credits for unpaid contributions Social Security of Spain, regarding whether the Social Security credits can be considered to be included in Section 2 of Article 2 of the Brussels Convention of 1926. "for the unification of certain rules related to mortgages and maritime liens", just as was previously pre-

sented the Court by the Director General of the Merchant Marine.

3. My opinion is totally objective and I do not consider myself related to any person or entity of any kind, nor have I been requested to orient my opinion in any determined way. This opinion is based on my participation as a Spanish representative in the meetings of I.M.O.—U.N.C.T.A.D., and the knowledge that I have derived from them, and my expertise with respect to this issue.

4. A decision of this legal opinion requires that I address description of four different sections, referred to:

A. A study of the evolution of the ranking of credits for *salaries* under Spanish internal law.

B. A study of the evolution of the ranking of *Social Security contributions* under Spanish internal law.

C. Inclusion of credits for Social Security contributions under Section 2 of Article 2 of the Brussels Convention of 1926.

D. Conclusions.

5. My legal opinion.

A. *The study of the evolution of the ranking of credits for "salaries" under the Spanish internal maritime law.*

Before the dispositions of the Brussels Convention of 1926 were in force, as a result of the enactment of the Constitution of 1978, the order of ranking of the credits privileged as salaries was found in Article 580 of the Commercial Code of 1885 (applicable where there is no mortgage), and in Article 31 of the Ship Mortgage Law, of 1893, and in Article 32 of the Workers Statute, as follows:

Non-Mortgaged Vessel

Article 580 Code of Commerce.

"In every judicial sale of a vessel to pay creditors, the following will rank according to the following order:

1. Credits in favor of the public treasury supported by official certification from the competent authority.

2. Court costs of the judicial procedure, as taxed approved by the judge or the Court.

3. The salaries of the depositaries and the custodians of the vessel and any other costs or expenditures incurred in its conservation since the vessel enters the port until it is sold, which arise or are due by virtue of a justified account approved by the judge or Court.

4. The rent of the warehouse where the tackle and riggings of the ship were kept, pursuant to the contract.

5. "*Salaries owed to the Captain and crewmembers for the last voyage . . .*" (Exhibit 1)

Mortgaged vessel

Preferred credits, even though they do not appear registered in the Mercantile Registry (Article 31 of the Ship Mortgage Law)

"[The following] outrank a ship mortgage, without need that they be inscribed or noted in the Commercial Registry:

1. Taxes or contributions in favor of the State, of the Province or Municipality that were generated by the ship in its last voyage or during the immediate preceding year.

2. The rights of pilotage, tonnage and the rest and others of ports and *the salaries owed to the Captain and crewmembers,* and those *rights and salaries in the last voyage of the vessel.* (Exhibit 2).

The phrase *last voyage of the vessel* appears in both statutes. We must keep in mind that going back to the

classical time of the Code of 1885 and previous ones from where the expression arises, each voyage of a vessel (normally a round-trip), meant a different endeavor that was created for that purpose and it was economically liquidated at the end of the venture. This phrase has lost its original meaning, and its current interpretation by all therefore is that salaries owed are not limited to the last voyage.

Article 32 of the Workers' Statute (Law No. 8/1980 of March 10, B.O.E. number 64 of March 14, 1980), under section "salary guarantees," states:

> "1. The credits for salaries for the last 30 days of work, if its amount does not exceed two times the minimum interprofessional salary, will have preference above any other credit, even though it be guaranteed by mortgage or pledge . . ." (Exhibit 3).

From the above-cited statutes, we can note that the salary credits have beneficially developed in Spanish law and some of them have taken first place in the ranking list of credits, and the rest are in very privileged positions and always above any constituted mortgages.

B. *Study of the evolution of the ranking of Social Security contributions under Spanish internal law.*

Contributions owed to the Social Security have gained increasingly greater preferential status, since its beginnings with the law of July 17, 1958 (R. 1259), which set forth the preference and priority of credits for the last year's contribution to Social Security, over credits that, without special privilege, appear in public records, but lower ranking with respect to the credits in favor of the province or municipality for taxes of the last due annuity. (Article 1924, section 3, class 1 and article 1924, section 1 of the Civil Code). (Exhibit 4)

The maximum level of preference with respect to unpaid contributions to Social Security is achieved through

the enactment of law 4/90 of July 29, regarding the State Budget, which, in its Ninth Additional Disposition, changed the contents of Article 15 of law 40/80 of July 5, establishing the new text as follows:

> "1. Social Security credit contributions and joint collection concepts or if applicable, the surcharge or interest on them, will enjoy, with respect to the totality of same, the same order of preference as the credits referred to in Article 1924 of the Civil Code, Section 1 (D) of Section 1 of Article 913 of the Commercial Code.
>
> The other credits of Social Security will enjoy the same order of preference established in Section 2 (E) of Article 1924 of the Civil Code and in Section 1 (D) of Article 913 of the Commercial Code. . . ."

Thanks to this new drafting, *payments due to Social Security are equivalent to those taxes owed to the province or municipality, corresponding to the last new annuity that was not paid.* (Exhibit 5).

Taking into consideration the above-mentioned, along with Article 31, Section 1 of the Ship Mortgage Law (stated in paragraph A above), and in light of the correlation of credits for Social Security contribution not paid to tax debts, it can be affirmatively concluded that under *Spanish internal law, credits for contributions not paid to Social Security enjoy a privileged ranking over credits guaranteed by the mortgage on the vessel.* We are dealing with a "super privilege."

C. *Possible inclusion of the credits for Social Security contributions in Section 2 of Article 2 of the Brussels Convention of 1926.*

It is lamentable that neither the Spanish legislature nor our Supreme Court, has spoken on the ranking of Social Security contribution credits with relation to the privi-

leged credits of Article 2 of the Brussels Convention of 1926. Nonetheless, and due to the very privileged category that said credit enjoys in Spanish internal law, it is certain that, if the present controversy arises before the Spanish court, the court would have no choice but to decide between:

1. Lowering the ranking of the credit corresponding to Social Security contributions, granting it a position much inferior to the mortgage credit, or

2. Granting to the credit corresponding to Social Security contributions in the Convention of 1926 the very privileged place that it has within Spanish internal legislation.

In the *first case*, it is absolutely impossible that a credit of such an eminent social character, be lowered by a Spanish court. On the contrary, the principle, in case there was any doubt, is to protect the social issue, with preference over any other economical-commercial interest, and therefore the Court would throw out this option.

In the *second case*, the Court could be faced "ab initio" with the difficulty of where "to pigeonhole" such credits that do not appear to be in the Convention of 1926. Nevertheless, a second reading of Section 2 of said Convention would give the Court the solution that it would grasp immediately, since the expression of the cited article is very broad. It states as follows:

> "The credits resulting from the Captain's contract of service . . . ,"

which can encompass, without the least bit of difficulty, not only the salaries, but any other credit which is a *consequence of the Captain's contract and of other crew-members*, precisely such as the contributions to Social Security.

Moreover, if we compare the wording of Section 2 of Article 2 of the Brussels Convention of 1926, with that of Article 580, Section 6 of the Commercial Code:

"The *salaries* owed to the Captain and crewmembers. . . ,"

and with Article 31, Section 2 of the Ship Mortgage Law of 1893:

". . . and the *salaries* owed to the Captain and crewmembers. . .",

it is evident that we cannot equate the expression *salary* with that of *credits resulting from the contract of service,* since they are radically different. "Salaries" represent a species of the genus "credits resulting from the service contract". "Salaries" is a narrow concept. "Credits resulting from the service contract" is a broad concept, expansive and encompassing.

In the sense just mentioned, the most respected author in admiralty law of Spain RUIZ SOROA states:

2) "Credits resulting from the service contract of the Captain, of the crewmembers and of other persons serving onboard" are the 'labor credits' in the broadest sense of this concept, by far superior to that of 'salary credits' as known in the Spanish social legislation of matters of ranking (Article 32, Worker's Statute) . . .". (Vide Ruiz Soroa, J.M., *Maritime Law Manual: the vessel, the seaman, auxiliary personnel,* Basque Institute of Public Administration, ONETI, 1990, pp. 66 and 67), (Exhibit 6).

The undersigned professor has attended the last and conclusive session of the "Intergovernmental mixed group OMI-UNCTAD of Experts on Maritime Liens and Ship Mortgages and Related Issues" in London as Spain's representative (Exhibit 7), and I must manifest that the instructions received from the Spanish State, set forth by the ministry of Public Work and Transportation, through the Director General of the Merchant Marine (the only competent entity in the matter), was to include the contributions to the Social Security in Section 1 of Article 4 of

the new Convention project, identical to that set out by the United States of America, published in document LEG MLM/23, dated June 21, 1989 (Exhibit 8), backed by my representation. The position of Spain is, due to historic legislative reasons, identical to that maintained by France, whose courts have decisions interpreting Section 2 of Article 2 in this same way. A Spanish court would look favorably on such decisions. Furthermore, the Spanish administrative authorities insisted to me as well, in the *necessity of maintaining the privileged character of the credit corresponding to the Social Security contributions, with a preference to any other credit of economic character, whether of a mortgage or not.*

For these same reasons and instructions regarding the amendment of Article 4 of the Convention of 1967, with the purpose of clarifying the same, which in its original wording was narrower than Section 2 of Article 2 of the Convention of 1926 (*salary* v. *credit*), and based on the analysis set forth herein, it is evident that the *official* Spanish position which would be followed by a Spanish court would be that contributions to the Social Security undoubtedly enjoy a ranking above a ship mortgage, and that said contributions are included within the concept of *credits* as set forth in Section 2 of Article 2 of the Brussels Convention of 1926.

I have analyzed numerous documents (declarations and reports in favor and against, and other documents) in the case of "Banco de Credito Industrial, S.A. v. M/T STOLT LUISA PANDO, Civil Action No. 90-2411."

I would like to emphasize that in view of the cited documents and in light of what I express in this legal opinion that the position of Banco de Credito Industrial, S.A., as well as the opinion of the court of August 1, 1991 is *incorrect*, since Spain presently clearly recognizes that the contributions owed to the Social Security have the character of *salary* and *credit* within Section 2 of Article 2 of the Brussels Convention of 1926.

D. *Conclusions.*

1. Credits for *salaries* constitute a "superprivilege" under Spanish internal maritime law, totally outranking mortgage credits on the vessel.

2. Credits for the contribution to the Social Security have risen in status with respect to the ranking of the privileged credits in the internal Spanish law since 1958, when they were subordinated to the mortgage credits, until 1990 when they reach the first place in the ranking of credits, totally outranking the vessel mortgage credit.

3. The official position of Spain, expressed in the IMO-UNCTAD meetings attended by the undersigned Spanish representative is that the contributions to the Social Security outrank maritime mortgages generally, and are specifically included within Section 2 of Article 2 of the Brussels Convention of 1926.

4. If a Spanish judge were to resolve the present issue of the ranking of credits for un-paid Social Security contributions in relation to the applicability of the Brussels Convention of 1926, he would no doubt include such credits within the meaning of the expression "credits resulting from the service contract of the Captain and the crewmembers," as stated in Section 2 of Article 2 of the cited Convention.

5. The position of the competent Spanish administration is conclusive, inflexible, and repeated, in maintaining the character of "superprivilege" for the Social Security credit, in harmony with giving preference to protecting such credit over any other privilege of economic character."

Professor Dr. J.L. Rodriguez Carrion

APPENDIX I

CONSULADO GENERAL DE ESPAÑA

THE CONSUL GENERAL OF SPAIN IN THE CITY OF NEW ORLEANS AND HIS JURISDICTION.

CERTIFIES: That Mr. Rafael Lobcto Lobo is, since January 20, 1989, the Director General of the Merchant Marine. The Director General of the Merchant Marine is the highest official responsible for the Spanish Merchant Marine under the Minister of Public Works and Transport.

Therefore, his declaration of June 10, 1993, relative to the interpretation of the 1926 Brussels Convention on Privileges and Ship Mortgages represents the official position of the highest Spanish Authority in the matter.

Issued in New Orleans, Louisiana, on this first day of July, 1993.

[SEAL]

The Consul General of Spain

/s/ Pablo Sánchez-Terán
PABLO SANCHEZ-TERAN

APPENDIX J

INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES OF LAW RELATING TO MARITIME LIENS AND MORTGAGES, BRUSSELS, APRIL 10, 1926

Article 1

Mortgages, hypothecations, and other similar charges upon vessels, duly effected in accordance with the law of the Contracting State to which the vessel belongs, and registered in a public register either at the port of the vessel's registry or at a central office, shall be regarded as valid and respected in all the other contracting countries.

Article 2

The following give rise to maritime liens on a vessel, on the freight for the voyage during which the claim giving rise to the lien arises, and on the accessories of the vessel and freight accrued since the commencement of the voyage:

(1) Law costs due to the State, and expenses incurred in the common interest of the creditors in order to preserve the vessel or to procure its sale and the distribution of the proceeds of sale; tonnage dues, light or harbour dues, and other public taxes and charges of the same character; pilotage dues; the cost of watching and preservation from the time of the entry of the vessel into the last port.

(2) Claims arising out of the contract of engagement of the master, crew, and other persons hired on board.

(3) Remuneration for assistance and salvage, and the contribution of the vessel in general average;

(4) Indemnities for collision or other accidents of navigation, as also for damage caused to works forming part of harbours, docks, and navigable ways; indemnities

for personal injury to passengers or crew; indemnities for loss of or damage to cargo or baggage;

(5) Claims resulting from contracts entered into or acts done by the master, acting within the scope of his authority, away from the vessel's home port, where such contracts or acts are necessary for the preservation of the vessel or the continuation of its voyage, whether the master is or is not at the same time owner of the vessel, and whether the claim is his own or that of ship-chandlers, repairers, lenders, or other contractual creditors.

Article 3

The mortgages, hypothecations, and other charges on vessels referred to in Article 1 rank immediately after the secured claims referred to in the preceding article.

National laws may grant a lien in respect of claims other than those referred to in the said last-mentioned article, so, however, as not to modify the ranking of claims secured by mortgages, hypothecations, and other similar charges, or by the liens taking precedence thereof.

Article 4

The accessories of the vessel and the freight mentioned in Article 2, mean:

(1) Compensation due to the owner for material damage sustained by the vessel and not repaired, or for loss of freight;

(2) General average contributions due to the owner, in respect of material damage sustained by the vessel and not repaired, or in respect of loss of freight;

(3) Remuneration due to the owner for assistance and salvage services rendered at any time before the end of the voyage, any sums allotted to the master or other persons in the service of the vessel being deducted.

The provision as to freight apply also to passage money, and in the last resort, to the sums due under Article 4 of the Convention on the limitation of shipowners' liability.

Payments made or due to the owner on policies of insurance, as well as bounties, subventions, and other national subsidies are not deemed to be accessories of the vessel or of the freight.

Notwithstanding anything in the opening words of Article 2, (2), the lien in favour of persons in the service of the vessel extends, to the total amount of freight due for all voyages made during the subsistence of the same contract of engagement.

Article 5

Claims secured by a lien and relating to the same voyage rank in the order in which they are set out in Article 2. Claims included under any one heading share concurrently and rateably in the event of the fund available being insufficient to pay the claims in full.

The claims mentioned under Nos. 3 and 5 in that article rank, in each of the two categories, in the inverse order of the dates on which they came into existence.

Claims secured by a lien and attaching to the last voyage have priority over those attaching to the previous voyage.

Article 6

Claims secured by a lien and attaching to the last voyage have priority over those attaching to previous voyage.

Provided that claims, arising on one and the same contract of engagement extending over several voyages, all rank with claims attaching to the last voyage.

Article 7

As regards the distribution of the sum resulting from the sale of the property subject to a lien, the creditors whose claims are secured by a lien have the right to put forward their claims in full, without any deduction on account of the rules relating to limitation of liability; provided, however, that the sum apportioned to them may not exceed the sum due having regard to the said rules.

Article 8

Claims secured by a lien follow the vessel into whatever hands it may pass.

Article 9

The liens cease to exist, apart from other cases provided for by national laws, at the expiration of one year, and, in the case of liens for supplies mentioned in No. 5 of Article 2, shall continue in force for not more than six months.

The periods for which the lien remains in force in the case of liens securing claims in respect of assistance and salvage run from the day when the services terminated, in the case of liens securing claims in respect of collision and other accidents and in respect of bodily injuries from the day when the damage was caused; in the case of liens for the loss or damage to cargo or baggage from the day of the delivery of the cargo or baggage or from the day when they should have been delivered; for repairs and supplies and other cases mentioned in No. 5 of Article 2 from the day the claim originated. In all the other cases the period runs from the enforceability of the claim.

The fact that any of the persons employed on board, mentioned in No. 2 of Article 2 has a right to any payment in advance or on account does not render his claim enforceable.

As respects the cases provided for in the national laws in which a lien is extinguished, a sale shall extinguish a lien only if accompanied by formalities of publicity which shall be laid down by the national laws. These formalities shall include a notice given in such form and within such time as the national laws may prescribe to the authority charged with keeping the registers referred to in Article 1 of this Convention.

The grounds upon which the above periods may be interrupted are determined by the law of the court where the case is tried.

The High Contracting Parties reserve to themselves the right to provide by legislation in their respective countries, that the said periods shall be extended in cases where it has not been possible to arrest the vessel to which a lien attaches in the territorial waters of the state in which the claimant has his domicile or his principal place of business, provided that the extended period shall not exceed three years from the time when the claim originated.

Article 10

A lien on freight may be enforced so long as the freight is still due or the amount of the freight is still in the hands of the master or the agent of the owner. The same principle applies to a lien on accessories.

Article 11

Subject to the provisions of this Convention, liens established by the preceding provisions are subject to no formality and to no special condition of proof.

This provision does not affect the right of any State to maintain in the legislation provisions requiring the master of a vessel to fulfill special formalities in the case of certain loans raised on the security of the vessel, or in the case of the sale of its cargo.

Article 12

National laws must prescribe the nature and the form of documents to be carried on board the vessel in which entry must be made of the mortgages, hypothecations, and other charges referred to in Article 1; so, however, that the mortgagees requiring such entry in the said form be not held responsible for any omission, mistake, or delay in inscribing the same on the said documents.

Article 13

The foregoing provisions apply to vessels under the management of a person who operates them without owning them or to the principal character, except in cases where the owner has been dispossessed by an illegal act and where furthermore the claimant is not a *bona fide* claimant.

Article 14

The provisions of this Convention shall be applied in each Contracting State in cases in which the vessel to which the claim relates belongs to a Contracting State, as well as in any other cases provided for by the national laws.

Nevertheless the principle formulated in the preceding paragraph does not affect the right of the Contracting States not to apply the provisions of this Convention in favour of the nationals of a non-contracting State.

Article 15

This Convention does not apply to vessels of war, nor to government vessels appropriated exclusively to the public service.

Article 16

Nothing in the foregoing provisions shall be deemed to affect in any way the competence of tribunals, modes or

procedure or methods of execution authorized by the national law.

Article 17

After an interval of not more than two years from the day on which the Convention is signed, the Belgian Government shall place itself in communication with the Governments of the High Contracting Parties which have declared themselves prepared to ratify the Convention, with a view to deciding whether it shall be put into force. The ratifications shall be deposited at Brussels at a date to be fixed by agreement among the said Governments. The first deposit of ratifications shall be recorded in a procès-verbal signed by the representatives of the powers which take part therein and by the Belgian Minister for Foreign Affairs.

The subsequent deposits of ratifications shall be made by means of a written notification, addressed to the Belgian Government, and accompanied by the instrument of ratification.

A duly certified copy of the procès-verbal relating to the first deposit of ratifications, of the notification referred to in the previous paragraph, and also of the instruments of ratification accompanying them, shall be immediately sent by the Belgian Government through the diplomatic channel to the powers who have signed this Convention or who have acceded to it. In the cases contemplated in the preceding paragraph the said Government shall inform them at the same time of the date on which it received the notification.

Article 18

Non-signatory States may accede to the present Convention whether or not they have been represented at the international Conference at Brussels.

A State which desires to accede shall notify its intention in writing to the Belgian Government, forwarding to it the document of accession which shall be deposited in the archives of the said Government.

The Belgian Government shall immediately forward to all the states which have signed or acceded to the Convention, a duly certified copy of the notification and of the act of accession, mentioning the date on which it received the notification.

Article 19

The High Contracting Parties may at the time of signature, ratification, or accession declare that their acceptance of the present Convention does not include any or all of the self-governing dominions, or of the colonies, overseas possession, protectorates, or territories under their sovereignty or authority, and they may subsequently accede separately on behalf of any self-governing dominion, colony, overseas possession, protectorate or territory excluded in their declaration. They may also denounce the Convention separately in accordance with its provision in respect of any self-governing dominion, or any colony, overseas possession, protectorate or territory under their sovereignty or authority.

Article 20

The present Convention shall take effect, in the case of the states which have taken part in the first deposit of ratifications, one year after the date of the procès-verbal recording such deposit. As respects the states which ratify subsequently or which accede, and also in cases in which the convention is subsequently put into effect in accordance with article 19, it shall take effect six months after the notifications specified in article 17, § 2, and article 18, § 2, have been received by the Belgian Government.

Article 21

In the event of one of the Contracting States wishing to denounce the present Convention, the denunciation shall be notified in writing to the Belgian Government, which shall immediately communicate a duly certified copy of the notification to all the other states informing them of the date on which it was received.

The denunciation shall only operate in respect of the state which made the notification, and on the expiration of one year after the notification has reached the Belgian Government.

Article 22

Any one of the Contracting States shall have the right to call for a new conference with a view to considering possible amendments.

A State which would exercise this right should give one year advance notice of its intention to the other states through the Belgian Government, which would make arangements for convening the conference.

PROTOCOL OF SIGNATURE

In proceeding to the signature of the International Convention for the unification of certain rules relating to maritime liens and mortgages, the undersigned Plenipotentiaries have adopted the present Protocol, which will have the same force and the same value as if the provisions were inserted in the text of the Convention to which it relates:

I. It is understood that the legislation of each state remains free

(1) to establish among the claims mentioned in No. 1 of article 2, a definite order of priority with a view to safeguarding the interests of the Treasury;

(2) to confer on the authorities administering harbours, docks, lighthouses, and navigable ways, who have caused a wreck or other obstruction to navigation to be removed, or who are creditors in respect of harbour dues, or for damage caused by the fault of a vessel, the right, in case of non-payment, to detain the vessel, wreck, or other property, to sell the same, and to indemnify themselves out of the proceed in priority to other claimants, and

(3) to determine the rank of the claimants for damages done to works otherwise than as stated in Article 5 and in Article 6.

II. There is no impairment of the provisions in the national laws of the Contracting States conferring a lien upon public insurance associations in respect of claims arising out of the insurance of the personnel of vessels.

Done at Brussels, in a single copy, April 10, 1926.

Maritime Liens and Mortgages Convention, 1926

RATIFICATION:

Belgium	June 2, 1930
Brazil	April 28, 1931
Denmark	June 2, 1930
Esthonia	June 2, 1930
France	August 23, 1935
Hungary	June 2, 1930
Italy	December 7, 1949
Malgache Republic	August 23, 1935
Norway	October 10, 1933
Poland	October 26, 1936
Rumania	August 4, 1937
Spain	June 2, 1930
Sweden	July 1, 1938

DENUNCIATION:

Denmark	March 1, 1965
Finland	March 1, 1965
Norway	March 1, 1965
Sweden	March 1, 1965

ACCESSION:

Algeria	April 13, 1964
Argentina	April 19, 1961
Cuba	November 21, 1983
Finland	July 12, 1934
Haiti	March 19, 1965
Iran	September 8, 1966
Lebanon	March 18, 1969
Monaco	May 15, 1931
Portugal	December 24, 1931
Switzerland	May 28, 1954
Syria	February 14, 1951
Turkey	July 4, 1955
Uruguay	September 15, 1970
Zaire Republic	July 17, 1967

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

TESORERIA GENERAL DE LA SEGURIDAD SOCIAL DE ESPAÑA,
Petitioner,
v.
BANCO DE CRÉDITO INDUSTRIAL, S.A.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED

Whether the court of appeals properly decided an issue of Spanish law by relying on traditional principles of treaty interpretation, and disregarding the contention, made for the first time in a petition for rehearing, that it must solely defer to the opinion of a Spanish official.*

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* Banco Exterior de España, S.A., the successor banking corporation of Banco de Crédito Industrial, S.A., formerly Banco de Crédito a la Construcción, S.A., adopts the Rule 29.1 statement in the Petition for Writ of Certiorari at ii.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-613

TESORERIA GENERAL DE LA SEGURIDAD SOCIAL DE ESPAÑA,

Petitioner,

v.

BANCO DE CRÉDITO INDUSTRIAL, S.A.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF RESPONDENT BANCO DE CREDITO INDUSTRIAL, S.A. IN OPPOSITION

Respondent Banco Exterior de España, S.A., the successor banking corporation of Banco de Crédito Industrial, S.A., formerly Banco de Crédito a la Construcción, S.A., respectfully requests that this Court deny the petition for a writ of certiorari.

STATEMENT OF THE CASE

1. Respondent loaned Marítima Antares, S.A. ("the shipowner") sums exceeding $40 million and took a mortgage on two ships. After the shipowner defaulted, respondent seized the two ships in July 1990 while they were in Louisiana and Texas ports. In the subsequent in rem proceeding consolidated in the United States District

Court for the Eastern District of Louisiana, petitioner Tesorería General de la Seguridad Social de España intervened and asserted a right to collect social security contributions arising out of the shipowner's employment of seamen on the vessels.

Petitioner deliberately chose a forum in the United States rather than in Spain. It intervened in the United States action to avoid presenting its claim in Spain where the shipowner was in bankruptcy and where a labor tribunal was determining the shipowner's debt to its seamen and employees for their wages. In the United States, petitioner opposed the shipowner's forum non conveniens motion, which sought a return of the dispute to Spain. Memorandum in Opposition to Motion to Reconsider Dismissal For Forum Non Conveniens, Record in No. 91-3922 at 741, 743 (petitioner "should not be forced to go to a jurisdiction where [it] did not choose to intervene").

2. United States law governs the priority of liens asserted against ships seized in United States ports. Respondent's preferred mortgage lien had priority over all other claims to the vessel, 46 U.S.C. § 31326(b)(1) (Supp. 1993), unless petitioner could establish that its claim was entitled to priority as a lien for "wages of the crew," 46 U.S.C. § 31301(5)(D) (Supp. 1993). In construing this statute, United States courts have repeatedly held that the priority for "wages" does not grant priority to claims for "taxes," including government claims against an employer for withheld United States income taxes and social security payments. The purpose of the "sacred" wage lien is to protect seamen, not to protect the government. *See, e.g., National Bank of North America v. S/S Oceanic Ondine*, 335 F. Supp. 71, 72-3 (S.D. Tex. 1971), *aff'd*, 452 F.2d 1014 (5th Cir. 1972); *Kesselring v. F/T Arctic Hero*, 1993 A.M.C. 447 (D. Alaska 1992).

The nature of a maritime lien, however, is determined by the law under which it arises. The question here was

thus whether Spanish law treats petitioner's claims as being claims with maritime wage lien status or whether Spanish law affords such claims some other priority, such as the priority assigned to taxes.

There is no directly applicable Spanish statute. Spanish law looks to the International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages, Brussels, April 10, 1926, 120 L.N.T.S. 187 ("1926 Brussels Convention"), *reprinted in* 6C *Benedict on Admiralty* 15-24.20 (7th ed. 1993), Pet. App. J. 55a-65a.

3. In October 1990, respondent moved for summary judgment to establish the priority of its mortgage. In support of its motion, respondent submitted the expert affidavit of Antonio Viñal, Director of the European Institute of Maritime Studies at Gijoń, Spain, as well as a practicing lawyer and member of the Spanish Maritime Law Association. Señor Viñal offered the opinion that the Brussels Convention of 1926 did not confer maritime lien status on claims for unpaid social security contributions. He also pointed out that internal Spanish law treats such claims as having the priority for taxes, not the priority of a maritime wage lien. Supporting this opinion, respondent tendered excerpts of reports from several international bodies, including the Joint Intergovernmental Group of Experts on Maritime Liens and Mortgages and Related Subjects ("JIGE"), which is comprised of representatives of the United Nations Conference on Trade and Development and the International Maritime Organization.

All petitioner offered in response was a few excerpts from similar reports, an affidavit on the lien status of social security contributions in certain civil law countries that are not signatories to the 1926 Convention, and an unsworn "statement" from Señor Jose Antonio Cruz Ruiz, who describes himself as an official of the "General Office of the Merchant Marine." The statement concedes

that international reports show that Spain does not give social security claims maritime lien status, but says this is not the "official position of The Spanish Administration." Pet. App. F. 39a-40a.

In July 1991, the district court granted respondent's summary judgment motion. Pet. App. B. The court relied on the international reports and rejected all expert affidavits on both sides as being "conclusory." *Id.* at 31a.

4. Petitioner moved to alter and amend the judgment. Petitioner attacked the international reports as being outdated. Petitioner submitted the affidavits of three additional experts. Significantly, however, none of these three experts gave any weight to the opinion expressed by Señor Cruz Ruiz. None even mentioned his opinion as a factor in their determinations. *See, e.g.*, Pet. App. H. 45a. Rather, they opined that a "Spanish court" would hold with petitioner if it adopted their reading of the text of the 1926 Brussels Convention, certain internal Spanish statutes, and allegedly instructive precedent from France. *Id.* at 50a-52a. The district court denied the motion without opinion.

5. On appeal, the Fifth Circuit affirmed. It considered and rejected petitioner's two contentions. Pet. App. A.

First, petitioner contended that the broad language of the Brussels Convention supported a characterization of a social security claim as being a claim for wages under Article 2(2) of that Convention. The Fifth Circuit found petitioner's construction to be inconsistent with the text of the Protocol of Signature to the Convention. The Protocol says the Convention works "no impairment of the provisions in the national laws of the contracting States conferring a lien upon public insurance associations . . . ." The Fifth Circuit construed the Protocol as leaving it up to signatory countries to enact national legislation

which conferred such a lien. *Id.* at 15a. Drawing on the JIGE report, the court found that of 21 signatories to the 1926 Brussels Convention, only three recognized a maritime wage lien for social security contributions and, in each case, specific internal legislation had been adopted to accomplish that purpose. *Id.* at 15a-16a. Also, the tables in the JIGE report did not list the 1926 Brussels Convention as an authority which supported maritime lien status for social security claims. *Id.* at 17a.

Second, the Fifth Circuit rejected petitioner's argument based on certain Spanish internal laws which do not directly address maritime lien status. The court noted that petitioner's affidavits actually undermined petitioner's position because they conceded that Spanish internal law treats such claims as claims for taxes. *Id.* at 19a. *See* Pet. App. G. 49a ("equivalent to those taxes").

Finally, the Fifth Circuit noted that, if the law of the forum were applied, United States law does not regard social security and pension contributions as giving rise to a wage lien claim. Pet. App. A. 20a-22a.

6. In its petition for rehearing, petitioner introduced a new argument it had not previously raised. Petitioner argued for the first time that "all that is relevant" is the position espoused by a Spanish government official. Petition for Rehearing of Tesorería General de la Seguridad Social de España at 4. Petitioner tendered yet another unsworn statement from the General Directorate of the Merchant Marine, this time from Rafael Lobeto Lobo. Pet. App. G. Like the Cruz Ruiz affidavit tendered two years before, the Lobeto Lobo statement simply declares that the "General Directorate affirms that its interpretation since the named [1926] Convention came into force was that the [social security] contributions are included [in Article 2(2)]." *Id.* at 43a. The statement goes on to argue that Spain's recent support for amendments to the 1926 Convention to include the social security claim within wage lien status should not be construed to mean

that it does not believe that such a lien currently exists. *Id.*[1]

Petitioner cited no authority for the proposition that any court, whether in the United States or in Spain, would be required to defer slavishly to the self-serving opinion of a government official. The official "statements" themselves do not espouse this position, which is contrary to the approach taken by every other expert in the case. The court of appeals denied rehearing.[2]

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The only issue presented is one of Spanish law, which is inherently unworthy of review by this Court. But even if this Court were inclined to reach a question of foreign law, it is clear that the decision below is correct. Petitioner does not question the Fifth Circuit's interpretation of the text of the 1926 Brussels Convention, or its construction by other signatory countries. Rather, petitioner seeks review of a contention, raised for the first time on rehearing, that the Fifth Circuit was required

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[1] This claim is directly contrary to a contemporaneous news account which stated that the Spanish officials wanted new language in a 1993 Convention in order to "supersede" existing Spanish law:

> Strong support for the new convention was voiced by the Spanish representatives who indicated their government was likely to offer early ratification and was prepared to see the new international regime supersede domestic law.

New Convention on Maritime Mortgages, Lloyd's List, May 8, 1993.

[2] The Fifth Circuit refused petitioner's request to stay the mandate pending appeal. Petitioner did not seek a stay from this Court. On November 3, 1993, the district court dissolved and released the security bond which had provided the basis for continued jurisdiction in this in rem case. Petitioner did not appeal that decision. *See* App. 13a-15a.

to defer to the interpretation of the 1926 Brussels Convention espoused in conclusory, unsworn, statements submitted by two Spanish government officials.

Moreover, the petitioner concedes that the ultimate question is "what a Spanish court [w]ould do", Pet. at 10 n.6, yet the Petition fails to mention the only Spanish appellate court ruling on point, Judgment of February 12, 1993 (appeal by Impescamar, S.A.), Superior Court of Justice of Andalucía ("*Impescamar*"). Respondent has only recently learned of this decision. Petitioner was a party to the case, lost it, and yet made no mention of the decision in either its Petition for Rehearing or its Petition for Writ of Certiorari. An English translation of the decision is included in the appendix to this Brief in Opposition. App. 1a-12a. A duly authenticated copy of the original Spanish text has been lodged with the clerk and served on counsel opposite.

In sum, the decision below is correct and does not warrant further review.

I. THE FIFTH CIRCUIT APPLIED THE CORRECT STANDARDS OF TREATY INTERPRETATION AND ITS DECISION DOES NOT CONFLICT WITH ANY PRECEDENT OF THIS COURT OR OF ANY OTHER COURT OF APPEALS.

A. The Court of Appeals had the Discretion to Disregard an Argument Made for the First Time in a Petition for Rehearing With No Citation of Supporting Authority.

The Fifth Circuit's opinion does not address the question raised in the petition for certiorari, because petitioner did not timely and properly raise its contention that the court owed slavish deference to the opinion of the executive branch of the Spanish government.

Petitioner waived its contention in two ways. First, it did not raise the contention in its principal brief. Federal Rule of Appellate Procedure 28(a)(5) provides that the

principal brief of an appellant "shall contain the contentions of the appellant with respect to the issues presented . . . with citations to the authorities . . . relied on." The petition for rehearing is to bring to the court's attention points it has "overlooked," Fed.R.App.P. 40(a), not new points that were never presented.

Petitioner also waived its claim by not presenting the Fifth Circuit with any authority to support the argument it first raised in its Petition for Rehearing. Not one of the cases cited in the petition for certiorari was cited to the Fifth Circuit. The case for waiver here is made even stronger by petitioner's admission that the Fifth Circuit in oral argument specifically asked for guidance with respect to the factors to be consulted in treaty interpretation. *See* Pet. at 7-8.

Because the question was not properly raised below, and the Fifth Circuit's opinion does not address it, the question is not appropriate for certiorari review.

B. The Court of Appeals Was Not Required to Defer to an Unsworn Statement of a Spanish Government Official that Asserts a Treaty Interpretation Inconsistent with the Text of the 1926 Brussels Convention, Its Customary Interpretation Among Signatory Nations, the Past Official Spanish Position as Reflected by United Nations Documents, and Expert Affidavits.

Petitioner does not dispute that the Fifth Circuit's reading of the 1926 Brussels Convention is consistent with the text of the Convention, the Protocol of Signature, the uniform interpretation by the signatory nations, and even the past official Spanish position as reflected in the dispassionate JIGE report. Nor does petitioner deny that neither the Spanish Supreme Court nor the Spanish legislature has spoken on this question.

Petitioner, which deliberately kept this litigation away from the Spanish courts, now argues that United States

courts should ignore all these considerations because officials in a Spanish ministry have made conclusory statements that take a contrary view.

There is no merit to this position under either Spanish or United States law.

Spanish Law. The task of a United States Court in determining a question of Spanish law is to determine how a Spanish court would decide the question. Each of petitioner's experts phrased the question in precisely that manner. Petitioner has offered no evidence that a Spanish court would defer to a Spanish government official on this or any other issue. The Superior Court of Justice of Andalucía obviously did not defer to the executive branch position.

In fact, Spain follows international practice in treaty interpretation. It is a signatory to the 1969 Vienna Convention on the Law of Treaties, which requires that Spain interpret treaties by looking to the text, the context "including its preamble and annexes," and "subsequent practice in the application of the treaty" by signatory nations. *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, 1155 U.N.T.S. 331, *reprinted in* 6C Benedict *on Admiralty* 21-14 (7th ed. 1993). Nothing in this Convention suggests that Spain would interpret a treaty by looking solely to the opinion of its own executive branch officials.

United States Law. In the absence of any peculiar Spanish rules, the Fifth Circuit correctly applied customary standards for determining the meaning of foreign law, including treaties. The factors considered by the Fifth Circuit are identical to those considered by the Supreme Court in the cases cited by petitioner. *See also* 1 Restatement (Third), The Foreign Relations of the United States § 325 (1986).

For example, in *United States v. Stuart*, 489 U.S. 353 (1989), this Court construed an international conven-

tion by beginning with the text, saying the "clear import of treaty language controls." *Id.* at 365. The Court said non-textual sources, such as ratification history and subsequent operation, could be used to determine the intent of the treaty parties. *Id.* at 366. Other aids to interpretation included the "practice of treaty signatories." *Id.* at 369. Finally, "[a]lthough not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Id.* (quoting *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982)).

Here the Fifth Circuit properly relied on the text of the Protocol of Signature, the operation of the 1926 Brussels Convention in signatory countries, and the construction of the treaty by JIGE, an intergovernmental body. The Fifth Circuit was certainly not compelled by *Stuart* to follow the conclusory, unsworn assertions of two Spanish governmental officials whose connection to this controversy is entirely unclear. Liens are customarily adjudicated by courts, not executive officers. There is no proof that petitioner has ever asserted the rights claimed here in any other proceeding anywhere in the world, other than in *Impescamar*, where its position was rejected.[3]

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[3] In this Court, petitioner offers yet another conclusory, ex parte, unsworn statement, a letter from the Spanish Ministry of Foreign Affairs asserting that petitioner's interpretation of the 1926 Brussels Convention is that of the "Spanish State." Letter of Jose Ignacio Carbajal to William K. Suter, Oct. 13, 1993. This letter confirms that the executive branch of the Spanish government agrees with petitioner. The letter offers nothing, however, to show that the Spanish Supreme Court would accept the executive branch position. The *Impescamar* court rejected that position.

Also, this Court should refuse to consider letters and statements first tendered on appeal, without any leave being sought or obtained to supplement the record pursuant to Fed.R.App.P. 10(e). Petitioner deliberately chose to litigate this dispute in the United States

None of this Court's other treaty cases on which petitioner relies are in any way inconsistent with the analysis used by the court of appeals. *See The Amiable Isabella*, 19 U.S. 1 (1821) (where treaty referred to passport in form "annexed" and no form was annexed, court would not follow treaty but would apply the law of prize); *Tucker v. Alexandroff*, 183 U.S. 424 (1902) (the meaning of treaties "is to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts," *id.* at 438, reference made to text and construction by other countries); *Kolovrat v. Oregon*, 366 U.S. 187, 194-96 (1961) (in suit between private parties, deference would be given to notes exchanged between signatory countries, especially when supported by history of negotiations and text of other treaties); *Sumitomo Shoji America v. Avagliano*, 457 U.S. at 185 (in suit between private parties, deference given to "clear treaty language" confirmed by interpretation adopted by both signatory countries); *Chan v. Korean Air Lines Ltd.*, 490 U.S. 122, 134 (1989) (text prevails over argument based on drafting history).[4]

Nor is the Fifth Circuit's analysis of this treaty in conflict with an approach followed by any other court of appeals. *See Somportex Limited v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3rd Cir. 1971) (United States court would defer to prior decision of English court in same case), *cert. denied*, 405 U.S. 1017 (1972); *Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992) (deference given to French government's treaty interpretation which had been consistently and successfully asserted in domestic disputes).

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rather than in Spain and it is only reasonable that it should be bound by the procedural requirements of the United States Courts.

[4] Petitioner also cites *Chevron, U.S.A., Inc. v. Natural Resources Defense*, 467 U.S. 837 (1984). *Chevron* discusses court deference to administrative agencies. The case does not address the interpretation of multilateral treaties, and it has no bearing on how a Spanish court would interpret the treaty at issue.

In sum, even if it is assumed that the Fifth Circuit rejected petitioner's Petition for Rehearing on the merits, the Fifth Circuit's mode of reasoning in this case is consistent with the precedents of this Court and the other courts of appeal. For this additional reason, this case does not merit further review.

II. A SPANISH COURT HAS NOW REJECTED PETITIONER'S INTERPRETATION OF THE 1926 BRUSSELS CONVENTION.

In its February 12 *Impescamar* decision, the Superior Court of Justice of Andalucía held that unpaid social security obligations owed to petitioner do not give rise to a maritime wage lien. That case arose from the 1987 application of a Spanish company, Impescamar S.A., for an export license to sell a vessel to a French company. In order to get the license, it was required to pay social security taxes which a prior owner of the vessel had not paid. Impescamar then brought an administrative proceeding to recover the payments from the regional division of plaintiff.

The Superior Court, an appellate tribunal, held that the money should be repaid to Impescamar. The court held that unpaid social security taxes do not give rise to a maritime lien which encumbers a vessel. Like the Fifth Circuit, the court found it significant that Spain had not adopted any specific law giving social security contributions wage lien status:

> the Social Security quotas are not "privileged credits [liens] which follow the vessel, even if the owner changes," since no national law exists which concedes to them [Social Security quotas] such character.

App. at 6a. The court concluded:

> [Impescamar] was not obligated to the payment of said quotas, since these do not constitute charges [liens] which would attach to the vessel . . . .

App. at 10a. Petitioner has appealed this decision to the Spanish Supreme Court. No decision is likely to be reached in the near future.

In view of this Spanish appellate court decision, it is simply incredible that petitioner would attack the Fifth Circuit's similar decision as an "affront to the government of Spain" which threatens "diplomatic chaos." Pet. at 16.

III. THE COURT OF APPEALS' DECISION DOES NOT RESTRICT SPAIN'S ABILITY TO ADOPT A DIFFERENT RULE IN THE FUTURE.

One of the reasons that the law of the United States gives preferred status to wages, but not to taxes, is governments have the authority to control the lien status of taxes.

If Spain wants its social security contributions to be given wage lien status, then all it has to do is enact appropriate legislation under Protocol II of the 1926 Brussels Convention. That is what Belgium, France, and Italy have done.

Another possibility would be for petitioner to prevail on the Spanish Supreme Court to reverse the decision of the Superior Court of Justice of Andalucía in *Impescamar*.

In any event, this Court should not grant certiorari to resolve a question of Spanish law, raised in only two reported cases, when the petitioner is a Spanish governmental agency which has at its disposal ample alternative means of seeking to persuade the Spanish legislature or Supreme Court to adopt its contrary view.

CONCLUSION

This Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

A.M.P.A.

DON NARCISO RODRIGUEZ ESCOBAR, Secretary of the Second Section of the Chamber of Administrative Law Disputes in Seville of the Superior Court of Justice of Andalucia.

I CERTIFY: That in the appeal that is referred to below, the Chamber has rendered the following:

JUDGMENT

ILLUSTRIOUS MESSRS.
D. RAFAEL OSUMA OSIOS
DA. AMALIA BASANTA RODRIGUEZ
D. RAFAEL FERNANDEZ LOZANO

In the City of Sevilla, the 12th of February of 1993.

Before the Division of Administrative Law Disputes in Sevilla, of the Superior Court of Justice [Court of Appeals] of Andalucía, Appeal No. 1071/90, filed by the entity "IMPESCAMAR, S.A.", domiciled in Sevilla, represented by Attorney D. Manuel Pérez Perera and defended by Counsellor D. Fernando González de la Peña, against resolution of the Ministerio de Trabajo y Seguridad Social, represented and defended by the State Attorney. Tesorería General de la Seguridad Social is a co-defendant party, represented and defended by Counsellor D. Maximiliano Vilches Porran. The amount at issue was fixed at eleven million six hunrded thirty-four thousand six hundred twelve pesetas.

BACKGROUND

FIRST—In its written petition, the acting party requests that this Chamber render judgment annulling the disputed resolutions, with the other corresponding pronouncements of record.

SECOND—In its answer, the party sued requests a judgment dismissing the appeal interposed.

THIRD—The acting party interposed a petition for reconsideration of the decision of 2 October 1991, giving notification to the defendant and the co-defendant, bringing forth this petition of allegations. This Chamber issued a ruling dismissing said request. The co-defendant answered the petition requesting the inadmissibility of the appeal.

FOURTH—The parties were requested to present their written conclusions required by Article 78 of the Jurisdictional Law, and complied with said formality through their corresponding pleadings.

SIXTH—The legal prescriptions have been observed in the course of processing the appeal.

WHEREAS the judge rendering this decision is the Illustrious Magistrate Judge D. Rafael Fernández Lozano.

PRINCIPLES OF LAW

FIRST—For greater clarity of the controverted question, one should bear in mind the following: A) The vessel PLAYA DE YERBABUENA, registered in Book 7 of Vessels, folio 241, page No. 261, inscription 2nd of the Mercantile Registry of Santander, built by Astilleros de Santander, S.A. for Pesquerías de Barbate, S.A., as owner, and from which it acquired the possession and dominion on 22 August 1974, was mortgaged from 26 February 1974 with a mortgage guaranty of hypothecation credit for the construction of the vessel granted by CREDITO SOCIAL PESQUERO on 17 December 1973. Not having satisfied the hypothecation credit, said entity exercised a real hypothecation action to make effective its credit on 3 April 1978, the processing of which corresponded to the Court of First Instance No. 6 of Madrid, under No. 504/78, which decreed the embargo

[arrest] of the vesel and its annotation in the Mercantile Registry of Santander, which took place on 4 January 1977. Said Court, over the objection of Pesquerías de Barbate, S.A., sold the vessel on 10 February 1981 to Crédito Social Pesquero (folio 279 exp.) and by ruling of the month of 1981, cancelled the naval mortgage and the corresponding annotations of embargo, "and the other charges and liens, inscriptions and annotations which could have been exercised with posterity to the inscription of the mortgage." (F.304 expd). Among said annotations appeared in the Mercantile Registry of Santander, a preventive embargo annotation on the vessel dated 8 June 1979, decreed by the Labor Magistrate Court of Cádiz, in connection with unpaid social security quotas, which was prosecuted at the request of the Instituto Social de la Marina against Pesquerías de Barbate, S.A. seeking recovery of 17,000,000 [pesetas]. (f.243 exp).

Crédito Social Pesquero sold the vessel to D. Florentino Puerta Oviedo and his wife Da. María Juana Medina Gómez on 14 June 1985 (f. 305 exp.), who in turn sold it on 11 November 1985 to Puerta y Sola, S.A. (f. 320 exp.) which changed its name to IMPESCAMAR, S.A. on 2 December 1985 (Power of Attorney), which sold it to "SOCIETE D'ARMEMENT ET DE PECHE AL MOONIA, S.A." on 12 December 1985 (f. 333).

SECOND—On a certain date which is unknown but which of course is in 1986, the appellant IMPESCAMAR, S.A. requested from the Directorate General of Exports, a dependent of the State Secretariat of Commerce, of the Ministry of Economics and Treasury, an export license for the vessel destined to the referenced French company, which was "DENIED. Because of unfavorable report of the competent Organism" with a date which does not appear (folio 330 exp.). In said report, the Directorate General of the Instituto Social de la Marina, states on 9 April 1986 (Document 2 of the peti-

tion): With respect to your request dated 26 February last, registered with exit number 37/541, of 4 March, concerning the export of the vessel "PLAYA DE YERBABUENA", I communicate to you the following: 1—In accordance with the report of the Provincial Delegation of Cadiz and with certification issued by the Section of Control and Quotations of this Institute, said vessel has unpaid quotas for the periods November 1979 to December 1980, March 1981 to June 1982 and August to October of 1982, in the total amount of 6,479,135 pesetas; 2—In concordance with that established in Article 9 of the Refunded Text of the Special Rules of the Social Security for Workers at Sea, approved by Decree 2664/1974 of 30 August, an unfavorable decision is reported for the deletion of the flag for the export of said vessel.

THIRD—The appellant objects in this proceeding to the agreements of 11 September and 26 November 1987 of the Tesorería Territorial de la Seguridad Social de Cádiz which dismissed the petition which had been filed on 7 February 1987 for the return of 11,634,612 pesetas, plus interest, and the appeal of repossession formulated the following 20-9 (f.1 and 106 exp), and that of the Provincial Directorate of the Instituto Social de la Marina de Cádiz, of presumptive denial of the petition of 7 February 1987 requesting payment "in concept of damages" "the quantity of 3,900,000 pesetas for the delay in exporting the vessel . . . due exclusively to their improper and unlawful actions, demanding the payment of quotas which . . . were not owed."

In the petition filed, there is a demand, in addition to requesting the nullity of said agreements, of a series of pretensions which are unrelated to this proceeding, as will be discussed.

The Tesorería Territorial, in addition to alleging the cause of inadmissibility provided in Article 81(g) of the Jurisdictional Law, bases its opposition on Articles

24.1(b) and 25 of the Regulation of Special Rules of the Sea. The State Attorneys request the inadmissibility of the appeal as a result of the report of the Instituto Social de la Marina not being an actionable administrative act since it is a new procedures act, and if it were an actionable one, the administrative remedies have not been exhausted.

FOURTH—With respect to the causes of inadmissibility alleged by Tesorería and the State Attorneys, one has to bear in mind that the appealed decision from the Instituto Social de la Marina, is not the report issued on 9 April 1980, previously transcribed, nor the denial of the export license, but rather the presumptive denial by the Provincial Directorate of Cádiz of the petition that was made on 7 February 1987 requesting the indemnity of 3,900,000 pesetas for damages sustained because of the delay in exporting the vessel, as a result of being denied the export license because of the debated report, and said agreement of presumptive denial does not exist since the appellant has not denounced the delay (Article 94 L.P.A. and 38.1 L.J.) for which reason the causes of inadmissibility alleged by the respondents do not exist and that provided by Article 82, or in relation with 38.1 of the Jurisdictional Law, has not been alleged; but said issue is of no moment from the point in time when the appellant abandons said pretension in the petition and substitutes it with the indemnity for damages, in the initial amount of 5,500,000 pesetas "for the erroneous forwarding of this matter to the Social jurisdiction", which cannot be adjudicated in this process, since the [scope of the] initial petition of this administrative law appeal is that established by the limits of the process (Articles 57 L.J. and S.T.S. 11.11.69 and 11.3.90, among others).

FIFTH—According to Law 21 of August 1893, of Naval Hypothecation, the vessel is an immovable object (Article 1), even though for other effects it has the condition of being a movable object (Article 585 C. Com-

merce), for that reason for those effects, the vessel responds to all charges and liens which appear in the Mercantile Registry of the place of registration, regardless of who is the owner; but if as a result of the execution of a naval mortgage with guaranty of a construction credit, the same is cancelled, so are all the charges, liens, inscriptions and annotations inscribed in the Mercantile Registry with posterity, leaving the vessel free of charges and liens as an immovable (Article 50.2 L.H.N. and L.E. Civil), which occurred by the decree of April of 1981, issued by the Court of First Instance No. 6 of Madrid, which cancelled the preventive embargo annotation of 8 June 1979, decreed by the Magistrate Labor Court of Cádiz for unpaid social security quotas. In addition to that indicated, one should bear in mind that in conformity with Articles 31 and 32 of the Naval Hypothecation Law and Articles 2, 3 and 8 of the Brussels Convention of 10 April 1926, the Social Security quotas are not "privileged credits [liens] which follow the vessel, even if the owner changes," since no national law exists which concedes to them [Social Security quotas] such character.

SIXTH—Having discarded the responsibility of IMPESCAMAR, S.A. as owner of the vessel PLAYA DE YERBABUENA, we proceed to analyze if it has personal responsibility as a result of being the successor of previous businesses, whether they are shipping interests, ship operators, or owners of the vessel. The Administration alleges that the appellant is solidarily liable for the Social Security quotas which accrued prior to the sale of the vessel as a result of that established in Article 24.2(b) of the Regulations concerning the Special Rules of the Social Security for Workers at Sea approved by Decree 1867/70 of 9 July and as a result of not having requested from the Institute Social de la Marina an accredited certificate regarding the status of the previous Company with respect to its obligations for quotas under said Special Rules; a solidary responsibility which this Chamber cannot accept due to the general rule that for

an obligation to have solidary character, it has to be expressly constituted as such (Article 11.37 C. Civil), and that it is a law and not a general disposition of inferior juridical rank which has to declare the solidary liability (see Article 37 of the General Tributary Law).

This is corroborated especially for the payment of Social Security debts by those solidarily responsible in Article 10.1 of the General Regulations for Collection of Social Security, approved by R.D. 716/86, of 7 March and Article 6 of the Order of 23 October 1986, which develops that, in establishing: "The solidary responsibility for the payment of Social Security debts derives from the fact that the responsible party is made liable for the payments by the regulatory norms of the different authorities of the Social Security system which expressly imposes such responsibility", in other words, "on the assumption that legally or conventionally such responsibility is expressly imposed", necessitating that it be a law that imposes this solidary responsibility and not any general disposition of inferior rank.

SEVENTH—Effectively, Article 24.2(b) states "The acquiring party, in the cases of succession of title of a vessel or exploitation, will respond solidarily with the previous titular or with his rights the payment of the accrued quotas prior to said succession", but it is a case that said precept lacks legal coverage, which renders it a nullity under law in conformity with Articles 47.2 L.P.A. and 28 L.R.J.A.E., and while this Chamber may lack competence to declare the nullity of said precept, it likewise does not have competence to adjudicate the individual application of this act, on the basis that same is not in conformity with Law (Article 39.4 L.J.); control of the regulatory jurisdiction of the Administration which is imposed under Article 8 of the L.O.P.J.

Said Regulation develops Law 116/1969 of 30 December concerning the Special Rules of Social Security of Workers at Sea, which does not contain any express pre-

cept which authorizes the solidary responsibility of Article 24.2(b) which has been cited, and derogated whatever laws and dispositions are imposed to that established in same. Subsequent to the Regulation of 1970, through Decree 2864/1974, of 30 August the Refunded Text of Laws 116/69 and 24/72 of 21 June and of its Articles 7, 9, 11, 15 and 17, solidary responsibility is not reduced in any way between the acquirer of the vessel and its previous owner, only Article 9 imposes the obligation of justifying that the vessel is inscribed in the Registry of the Representative Entity and "is found current in the payment of quotas" but only as a necessary requirement "for the marine authorities to authorize its departure for sea", but without any possibility of the non-fulfillment of said obligation converting the infractor in a subrogee of the pending obligations and making him solidarily responsible for the quotas corresponding to the previous owners of the vessel. Neither does the Refunded Text of the General Social Security Law, approved by D.2065/1974 of 30 May establish the debated responsibility and only the solidary responsibility of Article 97.2, such that Chapter III "Protecting Action" and Section 2nd "General Rules of Contributions", in which it is comprised, as with its content: "the acquiring party will respond solidarily with the previous party or its heirs for the payment of contributions caused prior to said succession" does not permit the establishment of a solidary responsiblity with respect to the pending quotas in the "cases of succession in the title of exploitation, industry or business", and only with respect to the payment of pensions.

EIGHTH—In the cases of succession of title of vessels, Article 25.1 of the Regulation of 1970—D.1867/70 of 9 July, all that it does is *facultate* the acquiring party, and not impose the obligation to request from the Instituto Social de la Marine the issuance of an accredited certificate of the situation of the Company with respect to its obligations for payment of quotas to "said Special Rules" without the non-use of this faculty implying a

solidary responsibility, especially when said percept lacks the legal coverage required to deduce said solidary responsibility.

NINTH—The State Attorneys allege that the solidary responsibility of successor companies is covered by Article 44 of the Worker's Statute of 1980, which is not admissible since what said precept establishes is that the new employer shall be "subrogated in the labor rights and obligations of the previous company", leaving the assignee and the assignor "responding both solidarily during three years of the labor obligations which arose prior to the transmission and which have not been satisfied"; a precept which by being included in Section 2 of Chapter III: Modification, suspension and extinction of the contract of employment, "cannot refer to the quotas owed for Social Security by the previous owner, *but only to the existing labor relationships* between the employees of the previous company and the acquirer of the same.

TENTH—One cannot forget that in conformity with Articles 43 to 45 of R.D. 716/86 and Article 37.1 of the Order of 23 October 1986, norms which have already been cited, the obligation for payment of Social Security quotas prescribes in five years, beginning with the date they should have been perceptively paid and will be applied officially both in the collection proceedings for the voluntary period as well as in a judicial collection proceeding. When the appellant paid on 9 January 1987 the 11,624,612 pesetas, the return of which it claims in this proceeding, and which payment was made "without supposing the recognition of any debt or responsibility, without prejudice and reserving all rights of actions", the quotas which should have been paid prior to 9 January 1982 were prescribed; of those paid in the Magistrate Labor Court of Cádiz (folios 22 and 23 exp.), clearly the quotas corresponding to Pesquerías de Barbate, S.A. were prescribed since they were for the year 1970, without knowing their quantity, and those paid in the name of

Diego Grimaldi, S.A. and in the voluntary period, likewise those corresponding to the period April to December 1981 in the amount of 3,439,328 pesetas (f.14 exp); concerning the remaining quotas, we do not have sufficiently clear information in order to opine on their prescription.

ELEVENTH—If the quotas which were owed were 11,634,612 pesetas, 6,470,135 or 5,310,031 pesetas or another amount, a question which arises because of the diverse and contradictory certifications which are found in the file and decrees, it is totally indifferent [of no moment] since that which is requested by the appellant is the return of the first quantity, as an improper payment effected on 9 January 1987; a right which is conceded by Section 3 of Chapter IV of Title I of the Order of 23 October 1986 and Article 50 of the Refunded Text 1974-D.2065 of 1974, and if they are subordinated to a requirement that the amounts "must have been paid through error of fact or law", in the present case, the return is even more justified, since the appellant was not obligated to the payment of said quotas, since these do not constitute charges [liens] which would attach to the vessel, nor does the appellant have any solidary responsibility for same, and if these payments were made, they were made under formal protest and due to the negative [response] of the Administration in not granting the export license to the vessel as a consequence of the report issued by the Instituto Social de la Marina to the effect that the vessel had unpaid Social Security quotas, in the total amount of 6,479,135 pesetas, which is not true as has been reasoned, which is why we proceed to accede to the return [of the Social Security quotas].

TWELFTH—We do not find that bad faith or temerity exists such that would warrant the imposition of costs.

WHEREAS, having considered the cited articles and those of general application.

WE RULE: That rejecting the causes of inadmissibility offered by the State Attorney and Tesorería de la Seguridad Social and finding not to be in conformity with Law the Resolutions of 11 September and 26 November 1987 of the Tesorería Territorial de la Seguridad Social de Cádiz, we annul same finding them contrary to the juridical Order, and we accede in part to the pretensions pled by IMPESCAMAR, S.A. in its petition, ordering Tesorería to return to the appellant ELEVEN MILLION SIX HUNDRED THIRTY-FOUR THOUSAND SIX HUNDRED TWELVE pesetas, plus legal interest from 9 January 1987 until the date of payment, and in any event, we hold prescribed those quotas which are prior to 9 January 1982; without costs. And in due course with a certification of this judgment for its fulfillment, we return the administrative file to its place of origin.

Thus, this is our judgment, definitively ruling, and we pronounce, order and sign same.

SIGNATURES

That inserted [hereinabove] comports to the letter with its original to which I remit myself, the judgment remaining deposited in the Secretariat. And to confirm came, I extend the present,

SIGNATURE

SEAL

APOSTILLE (or sole legalization)

(Hague Convention of 5 October 1961
Royal Decree/1978 of 2 October)

1. Country: Spain.

   The present public document.

2. Has been signed by D. NARCISO RODRIGUEZ ESCOBAR.

3. Acting in his capacity as Secretary of the Chamber of Administrative Law Disputes.

4. It is sealed stamped with the seal of the Chamber of Administrative Law Disputes.

CERTIFIED

5. In Granada

6. On 16-11-93

7. By the Secretary of the Superior Court of Justice of Andalucia.

8. With Number: 1027/9

9. Seal Stamp.

10. Signature

[SEAL]

Signed MANUEL DOCAVO PAN

Minute Entry
McNamara, J.
November 2, 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 90-2376 cc
SECTION "D" (1)

PARCEL TANKERS, INC., *et al.*

versus

M/T STOLT LUISA PANDO, *et al.*

[Filed Nov. 3, 1993]

Before the court is a Motion to Dissolve Security and Tax Costs on Appeal Pursuant to FRAP 39(e), which was filed by Plaintiff, Banco Exterior de Espana, S.A., formerly Banco de Credito Industrial, S.A. ("BCI"). Defendant, Tesoreria General de la Seguridad Social de Espana ("Tesoreria General"), has filed an opposition to this motion which is before the court on briefs, without oral arguments.

This motion stems from a long, complex legal dispute in which the court is all too familiar and which is thankfully nearing an end. On July 29, 1993, the United States Fifth Circuit Court of Appeals affirmed this court's granting of summary judgment in favor of BCI finding, inter

alia, that Tesoreria General was not entitled to a maritime lien for unpaid social security contributions. The Fifth Circuit has denied both Defendant's Motion for Rehearing and Motion to Recall and Stay the Mandate Pending Application for a Writ of Certiorari to The United States Supreme Court on July 19, 1993 and August 24, 1993 respectively. As a result, BCI seeks to dissolve the substitute security posted by it, as evidenced by the Amended Bond in the amount of $8,000,000.00 dollars presented by BCI, as principal, and The Aetna Casualty and Surety Company as surety, and further seeks that the amount of bond premiums and bank confirming fees BCI has paid in relation to the Amended Bond be taxed as costs on appeal against Tesoreria General pursuant to FRAP 39(e). While the court finds that the Amended Security bond should be dissolved as the Fifth Circuit has ruled in favor of BCI and has failed to grant Defendant a stay, this court declines to tax as costs the amount of bond premiums and bank confirming fees BCI has paid in relation to the Amended Bond.

In pertinent part, FRAP 39(e) states "the premiums paid for costs of supersedeas bonds or other bonds to preserve rights pending appeal . . . shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule." This court is convinced that FRAP 39(e) is inapplicable to this case because the security posted by BCI was neither a supersedeas bond nor a bond to preserve rights on appeal. The security posted by BCI was done so voluntarily in order to secure claims by various parties due to the peculiarities of this case, which included vessel arrest and a substitution of the bond for the res in the registry of the court. BCI "offered to secure all outstanding claims on appeal in exchange for the privilege of withdrawing the monies on deposit with the registry of this court." *See* Minute Entry dated May 6, 1992. BCI could have chosen to leave the monies in the registry of the court, thereby avoiding

the expense of posting security. Therefore, BCI cannot now recover the expense of posting security which it chose to do solely for its own benefit.

Plaintiff cites *Trans World Airlines, Inc. v. Hughes,* 515 F.2d 173 (2nd Cir. 1975) and *Bose Corp. v. Consumer Union of U.S., Inc.,* 806 F.2d 304 (1st Cir. 1986) in support of its attempt to have this court tax as appeal costs BCI's expenses relating to letters of credit to secure a bond. While these cases have allowed taxation of expenses relating to letters of credit, they have each been premised upon a finding that these expenses were incurrd in lieu of the expenses attendant to a supersedeas bond. BCI prevailed in the trial court and voluntarily offered to post security in order that it could have the privilege of withdrawing the monies from the registry of the court. Because a supersedeas bond secures a prevailing party against any loss sustained as a result of being forced to forego execution on a judgment, BCI's expenses in posting the bond was not incurred in lieu of the expenses attendant to a supersedeas bond. Thus, this court finds FRAP 39(e) inapplicable. Accordingly,

IT IS ORDERED that Plaintiff's Motion to Dissolve Security be and is hereby GRANTED, DISSOLVING and RELEASING the Amended Bond for EIGHT MILLION AND NO/100 ($8,000,000.00) DOLLARS presented by Banco Exertior de Espana, S.A., formerly Banco de Credito Industrial, S.A. ("BCI"), as principal, and The Aetna Casualty and Surety Company, as surety.

IT IS FURTHER ORDERED that Plaintiffs Motion to Tax Costs on Appeal Pursuant to FRAP 39(e) be and is hereby DENIED.

* * * *

(3)

FILED
JAN 7 1994
OFFICE OF THE CLERK

No. 93-613

In The

Supreme Court of the United States

October Term, 1993

TESORERIA GENERAL DE LA SEGURIDAD SOCIAL DE ESPANA,

Petitioner,

vs.

BANCO DE CREDITO INDUSTRIAL, S.A.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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Supreme Court 29.1 1

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International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages, Brussels, April 10, 1926, 120 L.N.T.S. 187, and Articles 2(2) and 8 of that Convention ..... *passim*

APPENDIX

Appendix A — Decision of February 12, 1993 of the Superior Court of Justice of Andalucia 1a

I

Pursuant to Supreme Court Rule 15.6, the Petitioner[1], Tesoreria General de la Seguridad Social de España (Tesoreria General), respectfully submits this Reply Brief.

FURTHER REASONS FOR GRANTING THE WRIT

I.

PROPER TREATY INTERPRETATION AND INTERNATIONAL COMITY ARE IMPERILED BY THE FIFTH CIRCUIT'S DECISION.

This petition raises significant issues of treaty interpretation and international comity. As already discussed at length, Pet. 9-16, it involves the proper amount of respect a court of the United States should extend to the authentic treaty interpretations of a friendly, foreign sovereign. Respondent's attempts to obfuscate the issues with mistranslations, misstatements, and half-truths on the underlying, substantive question (the proper construction, as a matter of Spanish internal law, of the 1926 Brussels Convention on Maritime Liens), which admittedly does not rise to Rule 10 proportions, is a transparent ploy which the Court should recognize. The overriding principle of deference to a foreign Executive branch's interpretation of a treaty is of immense significance and is the real issue presented to this Court. The Fifth Circuit's decision, Pet. 12a-19a, arrogates substantial judicial authority and utterly ignores the Spanish goverment's authenticated and authoritative interpretations of the 1926 Convention.

The Fifth Circuit's methodology of treaty interpretation *might*

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1. Petitioner's list of interested persons and Rule 29.1 notation are set forth at page ii of their petition. Those listings remain current and no amendment is necessary.

have been appropriate if the dispute raised in this case, concerning priority of liens, were being decided as matter of United States admiralty law. It is not, as all the parties and the court below conceded. Pet. 11a-12a. Likewise, the Fifth Circuit's digression into extrinsic approaches to treaty interpretation, Pet. 12a, 13a-19a, *might* be deemed valid if, despite the case being decided under Spanish internal law, the United States was also a party to the 1926 Convention and the court found a conflict between the two countries' constructions. This is not the case here, as the United States is not a signatory to the 1926 Convention.

BCI attempts to mislead this Court by stating that the Fifth Circuit followed the proper and customary methods of treaty interpretation in ignoring the official Spanish position and following instead the language of the 1926 Convention. In fact, the clear language of the treaty compels the result opposite to that reached by the Fifth Circuit. The language of Article 2(2) of the 1926 Convention is extremely broad and on its face includes social security contributions, and numerous signatory nations, as well as renowned experts in the field of maritime liens, have stated that the treaty should be interpreted in the manner advanced by Tesoreria General and the Spanish officials. Even under BCI's best case scenario, the language of the treaty is ambiguous, in which case it was clearly improper for the court not to defer to the interpretation ordained by the Spanish Executive branch.[2] Ultimately, what other

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2. Respondent also contends that the issue of deference to the Spanish authorities is not properly before this Honorable Court because it was first raised in Petitioner's reply brief. Op. Cert. i 7-8. To the contrary, Tesoreria General has maintained all along that the courts must defer to the official Spanish position with regard to how the 1926 Convention should be interpreted and applied as Spanish law in this case. The district court actually attempted to ascertain the Spanish Government's intent; but it relied upon the wrong evidence. Instead of focusing on the declarations of the Spanish officials, it relied upon outdated and unofficial statements contained in JIGE reports and other irrelevant evidence (Cont'd)

countries, experts, or even the Fifth Circuit, might think, is irrelevant, since only *Spain's* interpretation is at issue.

Proper treaty interpretation compels deference to the declaration of a foreign executive branch, *not* the method used by the Fifth Circuit. There is not doubt that courts in this country defer substantially to the treaty interpretations proffered by the Executive branch. *See Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961); *United States v. Pink*, 315 U.S. 203, 220-21 (1942); *Nielsen v. Johnson*, 279 U.S. 47, 52-53 (1929); *Terrance v. Thompson*, 263 U.S. 197, 223 (1923); *Charlton v. Kelly*, 229 U.S. 447, 468 (1913); *Foster v. Nielson*, 27 U.S. (2 Pet.) 253, 307 (1829). As a matter of Spanish internal law, this deference is complete. Indeed, the fundamental misstep of the Fifth Circuit's decision was to equate Spanish, civilian methods of *statutory* interpretation with those of treaty construction. The court below said:

> Spain's legal system is civilian in nature. Therefore, the role of positive legislation is emphasized at the expense of stare decisis. To correctly interpret Spanish law, we look first to

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(Cont'd)

submitted by BCI. (Incredibly, BCI continues to rely on these reports, whose accuracy has been completely undermined.) Since the district court simply relied upon the wrong evidence as to what constitutes Spain's official position, Tesoreria General had no reason to suspect that the Fifth Circuit would completely ignore accepted principles of treaty interpretation and digress into its own unique brand of foreign treaty interpretation. Because the precise error addressed herein was first made by the appellate court, it is only logical that the error would be brought to light in a petition for rehearing. For BCI to suggest that the issue was waived is ludicrous. A careful reading of the Fifth Circuit's decision indicates that it addressed these issues. *See* Pet. 12a. The Fifth Circuit also gave judicial notice to "affidavits submitted by the parties," Pet. 12a n. 11, including those memorializing the Spanish government's interpretation of the 1926 Convention.

> the text of the legislation, and then to any customs which have developed with respect to its application. Finally, we can turn to judicial decisions to the extent that they fill in gaps left by law or custom.

Pet. 12a (citations omitted). This is an incorrect statement of Spanish internal law as to treaty construction and leads to the Fifth Circuit's cumulation of errors on treaty interpretation.

II.

EXECUTIVE PRONOUNCEMENTS ARE SUPERIOR TO JUDICIAL DECISIONS AND PROPER DEFERENCE SHOULD BE ACCORDED TO THEM IN TREATY INTERPRETATIONS.

A. The *Impescamar* decision is irrelevant and inapplicable to this matter and to a Spanish interpretation of the 1926 Brussels Convention.

Spanish governmental interpretations of executive agreements are superior to judicial decisions. For that reason, amongst others discussed below, respondent's offering of the *Impescamar* case of the Superior Court of Justice of Andalucia, Op. Cert. 12, 1a, as binding Spanish law is incorrect. BCI's attempted legerdemain should be completely evident to the Court.[3]

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3. A Spanish court decision is *not* Spanish law, as any civilian jurist would know, and has no binding effect on any court in Spain, much less a United States court determining Spanish law. This instant matter is decided by a United States court determining Spanish law as a Spanish court would; not by a United States court applying selected language (which doesn't even amount to dicta) from a Spanish decision which is not law. In fact, a Spanish court would *not* be bound by the decision of any other Spanish court, particularly a court of first instance such as the Superior Court of Justice of Andalucia was in this case. Futhermore, it is conceded the case is on appeal to the Spanish Supreme Court and thus can have no weight at all.

(Cont'd)

Moreover, the two extracted parts of the decision are translated incorrecly and are totally misleading;[4] the case was decided on grounds not even related to the issues herein. Contrary to respondent's assertion, the truth is that the issues raised in the instant litigation were never addressed by the *Impescamar* court.

The denial of Tesoreria General's claim in the *Impescamar*

(Cont'd)

Even a Spanish Supreme Court decision would not be binding on a lower Spanish court. Article 1 of the Spanish Civil Code states that jurisprudence is *not* a source of law and only complements it. Thus, regardless of what the *Impescamar* case stands for, it is *not* Spanish law and it is *not* binding on a court deciding the instant case; Spanish law is set forth by the Spanish Constitution, Spanish legislation, or authoritative declarations from relevant sources, such as government ministries. The *only* law on the underlying issues in this matter is the declarations presented by Petitioner.

4. Although Tesoreria General does not wish to waste the Court's time with an irrelevant and inapplicable Spanish case, which is inconsequential to this Petition, respondent has so blatantly twisted the decision and its translation, that is must be addressed. Tesoreria General strongly disputes the accuracy of the translation proffered by BCI in that it changes the meaning and connotations of certain key phrases. Tesoreria General submits herewith an accurate translation of the *Impescamar* decision as Appendix A, and particularly directs the Court's attention to the correct translations of paragraphs 5, 6, 10 and 11.

This translation was made by undersigned counsel, a native Spanish speaker from Bogota, Colombia, with an extensive international practice, and Dr. Bernardo Bentata, a Venezuelan and Louisiana lawyer practicing with the undersigned. The translation and meaning was discussed with the Spanish attorneys who handled the *Impescamar* case itself.

Additionally, Tesoreria General wishes to point out the fact that while BCI protests Testoreria General's failure to follow the FRAP rules for supplementing the record with regard to the official letter to the Court from the Spanish Ministry of Foreign Affairs, it has made no attempt of its own to properly "supplement the record" to include this Spanish decision.

decision was based on prescription, the fact that the lien for social security contributions did not survive the sale of the vessel, and that the social security debt was not transferred as a personal solidary obligation to the subsequent owner. The M/V PLAYA DE YERBABUENA was sold in a judicial sale on February 13, 1981, and the court therefore cancelled all "charges and encumbrances, inscriptions and annotations which could have been made subsequent to the inscription of the mortgage." (Appendix A, p. 3a) The vessel was mortgaged in 1974. The claimed social security contributions corresponded to periods subsequent to the inscription of the mortgage and were therefore cancelled. Thus, the issue was not whether social security contributions created a lien, but only whether such an obligation survived the mortgage cancellation.[5]

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5. The undersigned spoke personally with the attorney representing Tesoreria General (Mr. Maximiliano Vilchez) and Mr. Emiliano Alegre, whose firm assisted Mr. Fernando Gonzalez de La Peña (Impescamar's counsellor), and they both confirm that the case had nothing to do with the ranking of social security contributions, and that in fact they *have* the ranking of a wage lien. They stated that the decision stood only for the proposition that the social security lien did not survive the judicial sale of the vessel nor attach to the subsequent owner. With respect to the specific mention of the 1926 Brussels Convention, they clarified that this referred only to the character of the vessel as an immovable and had nothing to do with liens. In the words of Mr. Emiliano Alegre, attorney for Impescamar, the issue was whether or not the vessel's subsequent owners were responsible for the prior obligations of the vessel, *including social security liens;* which presupposes their existence. Lastly, they confirmed that this was *not* an appeal, but a matter of first instance handled by the Superior Court. This first hand and personal information comports directly with a *proper* translation and proper reading of the decision.

It is also interesting to note, since BCI accuses Petitioner of not informing the Court of this decision, that Mr. Alegre's firm was apparently hired by BCI to assist Dr. Gonzalez de la Peña (presumably in an unsuccessful attempt to try and influence the direction of the case). BCI therefore has known of this decision for months and never brought it to the attention of the Fifth Circuit, probably for the same obvious reason that Tesoreria General did not — the decision has nothing

(Cont'd)

Paragraph 5 of the decision was offered by BCI, based on its inaccurate translation, as standing for the illogical proposition, in light of the entire decision, that the social security contributions did not create a lien. The proper translation of relevant portions reveals the fallacy of BCI's position:

> *FIFTH*: Pursuant to the Law of August 21, 1883 of Maritime Mortgages, *the vessel* is an immovable (art. 1), although for other purposes it is considered a movable (Art. 585 of the Commercial Code), therefore, as it pertains to the former, *the vessel* is responsible for all charges and encumbrances recorded in the Mercantile Registry of its port of registration, regardless of who is the owner; but if as a result of the foreclosure of the maritime mortgage securing a mortgage credit for the construction, the same is cancelled, then so too are the charges, encumbrances, inscriptions and annotations subsequently made in the Mercantile Registry, leaving *the vessel* free and clear of charges and encumbrances as an immovable (art. 50.2 L.H.N. [Law of Maritime Mortgage] and L.E. Civil), that resulted from the decree of April 1981 issued by Court No. 8 of First Instance of Madrid, which cancelled the annotation of preventive attachment of June 8, 1979, decreed by the Labor Magistrate of Cadiz for sums due the Social Security. In addition to the above, it must be borne in mind that, in accordance with articles 31 and 32 of

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(Cont'd)

to do with the 1926 Convention. BCI is now trying to raise a last minute smokescreen in a bold and inappropriate attempt to mislead this Court with information it knows to be incorrect.

> the Law of Maritime Mortgage and art. 2, 3 and 8 of the Brussels Convention of April 10, 1926, the Social Security contributions are not "privileged credits that follow *the vessel*, notwithstanding a change in *her* owner", since there is no national law that grants *it* [*the vessel*] such character. [emphasis added].

The grammatical and substantive subject of the passage is "the vessel," which as an immovable, allows mortgages, liens and encumbrances to be placed on her.[6] In *Impescamar* the sale by court decree erased the prior social security liens registered against the vessel on June 8, 1979, such that these did not survive the sale of the vessel. No Spanish law gives *the vessel* (not the social security contributions, as misconstrued by BCI) the special character of allowing liens to follow against her owner after her sale.[7] This is quite different from stating that social security

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6. The language quoted by respondent from paragraph 11 (Resp., p. 11a) merely stands for the proposition that the payments were not due by *Impescamar* because *after* the mortgage was cancelled they did not attach to the vessel — which is quite different from concluding that the contributions did not create a lien in the first place.

7. Indeed, Articles 31 and 32 of the Law of Maritime Mortgages refer to immovables, *not* to liens. Articles 2, 3 and 8 of the 1926 Convention similarly refer to liens and whether they follow the vessel after a change in ownership. Article 8 specifically states: "claims secured by a lien follow the vessel into whatever hands it may pass." In this instance this principle was nullified by the sale of the vessel and prescription.

It is clear from the decision itself that the only issue was the liability of Impescamar, as owner of the vessel PLAYA DE YERBABUENA, and/or as successor to the vessel, and *not* the lien status, since immediately following paragraph five the court states:

"*SIXTH:* Having discarded the responsibility of

(Cont'd)

contributions do not have wage lien status because no Spanish law gives them that character. BCI has the wrong tail wagging the wrong dog.

Had the issue been, as respondent seeks to create, whether social security contributions gave rise to a maritime lien on the vessel, it would have been easily disposed of by simply referring to the court's ruling canceling all charges and encumbrances subsequent to recordation of the mortgage, or by a simple "no," if no lien existed. The fact that the court went through exhaustive additional analysis indicates that the contributions give rise to a lien, and the issue was whether and in what form, such lien survived the sale of the vessel. In conclusion, the *Impescamar* decision did not involve any of the issues before the Fifth Circuit or this Court, and specifically not the issue of deference to the executive branch, and is of no consequence for the procedural and substantive reasons stated.

Finally, BCI asserts that this Court should not grant the Petition for a Writ of Certiorari because the Government of Spain has other remedies to rectify the future impact of the Fifth Circuit's decision. Clearly, this is not the standard for determining whether certiorari should be granted. The mere possibility of prospective legislative relief is not a valid reason for failing to rectify erroneous judicial precedent, particularly where the import of this decision goes far beyond the limited issue of whether Spain does, or does not, afford preferred maritime lien status to social security contributions. It goes to the very heart of principles of judicial

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(Cont'd)

> Impescamar, S.A. as *owner* of the vessel PLAYA DE YERBABUENA, we proceed to analyze if it has *personal responsibility as a result of being a successor of previous businessmen. . .*"

Id. (emphasis added).

deference and international comity and, if left to stand, will have an adverse impact on the manner in which international treaties, and even domestic executive orders, are interpreted and enforced.

If left unreviewed, the Fifth Circuit's decision will frustrate principles of international comity. As this Court noted in *Hilton v. Guyot*, 159 U.S. 113 (1895), "[Comity] is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the right of its own citizens or of other persons who are under the protection of its laws." *Id.* at 163-64. This principle has been implicated in recent cases decided by this Court, *see, e.g., Hartford Ins. Co. v. California*, 113 S. Ct. 2891 (1993), and is profoundly at issue here. If the courts of the United States do not, as a matter of foreign law, defer to the properly-formulated interpretations of treaties embraced by friendly, foreign governments, how can our citizens expect the same treatment abroad? The Fifth Circuit's decision imperils respect of United States and foreign executive orders, and this Court should not be duped by respondent's attempts to avoid, or minimize the importance, scope, and relevance of, the issue before the Court.

CONCLUSION

For the foregoing reasons, along with those previously presented, the Petition should be GRANTED.

Respectfully submitted,

DEREK A. WALKER
Counsel of Record
CHAFFE, McCALL, PHILLIPS,
TOLER & SARPY, L.L.P.
Attorneys for Petitioner

APPENDIX A — DECISION OF FEBRUARY 12, 1993 OF THE SUPERIOR COURT OF JUSTICE OF ANDALUCIA

A.M.P.A.

DON NARCISO RODRIGUEZ ESCOBAR, Secretary of the Second Section of the Chamber of Administrative Law Disputes in Seville of the Superior Court of Justice of Andalucia.

I CERTIFY: That in the case that is referred to below, the Chamber has rendered the following:

JUDGMENT

Illustrious Messrs.

D. Rafael Osuna Osios
Da. Amalia Basanta Rodriguez
D. Rafael Fernandez Lozano

In the City of Seville, the 12th of Febuary of 1993.

Before the Chamber of Administrative Law Disputes in Seville, of the Superior Court of Justice of Andalucia, Case No. 1071/90, filed by the entity "IMPESCAMAR, S.A.," domiciled in Seville, represented by Attorney D. Manuel Perez Perera and defended by Counsellor D. Fernando Gonzalez de la Peña, against resolution of the Ministry of Labor and Social Security, represented and defended by the State Attorney. Tesoreria General de la Seguridad Social is a co-defendant party, represented and defended by Counsellor D. Maximiliano Vilchez Poras. The amount at issue was fixed at eleven million six hundred thirty-four thousand six hundred twelve pesetas.

Appendix A

BACKGROUND

FIRST - In its written petition, the plaintiff requests that this Chamber render judgment annulling the challenged resolutions, with the other corresponding pronouncements of record.

SECOND - In its answer, the defendant requests a judgment dismissing the petition filed.

THIRD - The plaintiff interposed a petition for reconsideration of the decision of 2 October 1991, giving notification to the defendant and the co-defendant, bringing forth this petition of allegations. This chamber issued a ruling dismissing said request. The co-defendant answered the petition requesting the inadmissibility of the case.

FOURTH - The parties were requested to present their written conclusions required by Article 78 of the jurisdictional Law, and complied with said formality through their corresponding pleadings.

SIXTH - The legal requisites have been complied with throughout the proceeding.

WHEREAS the judge rendering this decision is the Illustrious Magistrate Judge D. Rafael Fernandez Lozano.

PRINCIPLES OF LAW

FIRST - For greater clarity of the contested issue, one should bear in mind the following: A) The vessel PLAYA DE YERBABUENA, registered in Book 7 of Vessels, folio 241, page No. 261, inscription 2nd of the Mercantile Registry of Santander,

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built by Astilleros de Santander, S.A. for Pesquerias de Barbate, S.A., as owner, and from which it acquired the possession and dominion on 22 August 1974, was mortgaged since 26 February 1974 with a mortgage securing a mortgage credit for the construction of the vessel granted by CREDITO SOCIAL PESQUERO [social credit for fishing] on 17 December 1973. Its mortgage credit not having been satisfied, said entity exercised the real mortgage action to make effective its credit on 3 April 1978, the handling of which corresponded to the Court of First Instance No. 8 of Madrid, under No. 504/76, which decreed the embargo [attachment] of the vessel and its annotation in the Mercantile Registry of Santander, which took place on 4 January 1977. Said Court, over the objection of Pesquerias de Barbate, S.A. sold the vessel on 10 February 1981 to Credito Social Pesquero (f.275 record) and by ruling of the month of 1981, cancelled the maritime mortgage and the corresponding annotations of attachment, "and the other charges and encumbrances, inscriptions and annotations which could have been made subsequent to the inscription of the mortgage." (F.304 record). Among said annotations appeared in the Mercantile Registry of Santander, a preventive attachment annotation on the vessel dated 8 June 1979, decreed by the Labor Magistrate Court of Cadiz, in connection with unpaid social security contributions, which was prosecuted at the request of the Instituto Social de la Marina [Maritime Social Institute] against Pesquerias de Barbate, S.A. seeking recovery of 17,000,000 [pesetas]. (f.243 record).

Credito Social Pesquero sold the vessel to D. Florentino Puerta Oviedo and his wife Da. Maria Juana Medina Gomez on 14 June 1985 (f.305 record), who in turn sold it on 11 November 1985 to Puerta y Sola, S.A. (f.320 record) which changed its name to IMPESCAMAR, S.A. on 2 December 1985 (Power of Attorney), which sold it to "SOCIETE D'ARMEMENT ET DE PECHE AL MOONIA, S.A." on 12 December 1985 (f.333).

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SECOND - On a specific date which is unknown but is certainly in 1986, the plaintiff IMPESCAMAR, S.A. requested from the Directorate General of Exports, a dependency of the State Secretariat of Commerce, of the Ministry of Economics and Treasury, an export license for the vessel destined to the referenced French company, which was "DENIED. Because of unfavorable report of the competent Agency" with a date which does not appear (f.330 record). In said report, the Director General of the Maritime Social Institute, states on 9 April 1986 (Document 2 of the complaint): With respect to your request dated 26 February last, registered with exit number 37/541, of 4 March, concerning the export of the vessel "PLAYA DE YERBABUENA," I communicate to you the following: 1—In accordance with the report of the Provincial Delegation of Cadiz and with certification issued by the Section of Control and Contributions of this Institute, said vessel has unpaid contributions for the periods November 1979 to December 1980, March 1981 to June 1982 and August to October of 1982, in the total amount of 6,479,135 pesetas; 2—In accordance with that established in Article 9 of the Compilation Text of the Special Regime of the Social Security for Workers at Sea, approved by Decree 2664/1974 of 30 August, an unfavorable decision is reported for the deletion of the flag for the export of said vessel.

THIRD - Petitioner challenges in this action the resolutions dated September 11 and 265 (sic) November, 1987 of the Territorial Treasury of the Cadiz Social Security, which dismissed the petition filed on February 7, 1987 for reimbursement of 11,034,612 pesetas, plus interest, and the Motion to Set Aside filed on the following 20-9 (fs. 1 and 106 record) and the Petition filed by the Provincial Directorate of the Maritime Social Institute of Cadiz, of presumptive denial of its petition dated February 7, 1987 for deposit "for damages" "of the amount of 3,900,000 pesetas, for the delay in exporting the vessel . . . caused solely by its

inappropriate and illegitimate actions, demanding payment of contributions . . . they did not owe."

In the petition, it [the plaintiff] alleges, in addition to requesting the nullity of said agreements, a series of claims which are foreign to this proceeding, as will be stated.

The Territorial Treasury, besides raising the exception of inadmissibility set forth in Article 81, (g) of the Jurisdictional Law, bases its opposition on Articles 24.1(b) and 25 of the Regulation of the Special Regime of the Sea. The state attorney alleges that the action is inadmissible since the report of the Maritime Social Institute is not a challengeable administrative act since it is an act in a new proceeding, and [even] if it were not, the administrative procedures were not exhausted.

FOURTH - With respect to the causes of inadmissibility alleged by Tesoreria and the State Attorneys, one has to bear in mind that the Maritime Social Institute decree challenged is not the pleading issued on 9 April 1980, previously transcribed, nor the denial of the export license, but rather the presumptive denial by the Provincial Directorate of Cadiz of the petition filed on 7 February 1987 requesting the indemnity of 3,900,000 pesetas for damages sustained because of the delay in exporting the vessel, as a result of being denied the export license because of the disputed resolution, and said resolution of presumptive denial does not exist since the petitioner has not denounced the delay (Article 94 L.P.A. and 38.1 L.J.) for which reason the causes of inadmissibility alleged by the defendants do not exist and that provided by Article 82(c) with regard to 38.1 of the Jurisdictional Law, was not alleged; but said issue is of no moment from the point in time when the petitioner abandons said claim in the petition and substitutes it for that of indemnity for damages, in the initial amount of

5,500,000 pesetas "for the erroneous forwarding to the Social jurisdiction," which cannot be adjudicated in this proceeding, since the initial brief of this administrative law matter is the one that establishes the limits of the proceeding (Articles 57 L.J. and S.T.S. 11.11.69 and 11.3.90, among others).

FIFTH - Pursuant to the Law of August 21, 1883, of Maritime Mortgages, the vessel is an immovable (Article 1), although for other purposes it is considered a movable (Article 585 of the Commercial Code), therefore, as it pertains to the former, the vessel is responsible for all charges and encumbrances recorded in the Mercantile Registry of its port of registration, regardless of who is the owner; but if as a result of the foreclosure of the maritime mortgage securing a mortgage credit for the construction, the same is cancelled, then so too are the charges, encumbrances, inscriptions and annotations subsequently made in the Mercantile Registry, leaving the vessel free and clear of charges and encumbrances as an immovable (Article 50.2 L.H.N. [Law of Maritime Mortgage] and L.E. Civil), that resulted from the decree of April 1981 issued by Court No. 8 of First Instance of Madrid, which cancelled the annotation of preventive attachment of June 8, 1979, decreed by the Labor Magistrate of Cadiz for sums due the Social Security. In addition to the above, it must be borne in mind that, in accordance with Articles 31 and 32 of the Law of Maritime Mortgage and Articles 2, 3 and 8 of the Brussels Convention of April 10, 1926, the Social Security contributions are not "privileged credits that follow the vessel, notwithstanding a change in her owner," since there is no national law that grants it [the vessel] such character.

SIXTH - Having discarded the responsibility of IMPESCAMAR, S.A. as owner of the vessel PLAYA DE YERBABUENA, we proceed to analyze if it has personal responsibility as a result of being a successor of previous

businessmen whether they are shipping interests, [ship] operators, or owners of the vessel. The Administration alleges that the petitioner is solidarily liable for the Social Security quotas which accrued prior to the purchase of the vessel as set forth in Article 24.2(b) of the Regulation concerning the Special Regime of the Social Security for Workers at Sea approved by Decree 1867/70 of 9 July and for not having requested from the Maritime Social Institute an accredited certificate regarding the status of the previous Company with respect to its obligations for contributions under said Special Regime; a solidary responsibility which this Chamber cannot accept due to the general rule that for an obligation to have solidary character, it has to be expressly constituted as such (Article 1131 C. Civil), and that it is a Law and not a general order of inferior juridical rank which has to declare the solidary liability (see Article 37 of the General Tributary Law).

This is corroborated especially for the payment of Social Security debts by those solidarily responsible in Article 10.1 of the General Regulations for Collection of the Social Security, approved by R.D. 716/86, of 7 March and Article 6 of the Order of 23 October 1986, which the former develops, in establishing: "The solidary responsibility for the payment of Social Security debts derives from the fact that the responsible party is liable on the assumption that under the regulatory norms of the different authorities of the Social Security system, said responsibility is expressly imposed," in other words, "on the assumption that legally or conventionally such responsibility is expressly imposed," requiring that the legal norm by the nature of solidary responsibility, be a Law, and not any general provision of inferior rank.

SEVENTH - Indeed, Article 24.2(b) states "The acquirer, in the cases of succession of title of a vessel or exploitation, will

respond solidarily with the previous title holder or with his rights for the payment of the contributions accrued prior to said succession," but it is the case that said precept lacks legal coverage, which renders it a nullity at law in conformity with Articles 47.2 L.P.A. and 28 L.R.J.A.E., and although this Chamber lacks competence to declare the nullity of said precept, it does have competency to adjudicate its individual application on the basis that same is not in conformity with Law (Article 39.4 L.J.); control of the obligatory jurisdiction of the Administration which is imposed under Article 8 of the L.O.P.J.

Said Regulation is developed in Law 116/1969 of 30 December concerning the Special Regime of Social Security of Workers at Sea, which does not contain any express precept which authorizes the solidary responsibility of Article 24.2(b) which has been cited, and repealed whatever laws and provisions are opposed to that established in same. Subsequent to the Regulations of 1970, through Decree 2864/1974, of 30 August the Compiled Text of Laws 116/69 and 24/72 of 21 June and its Articles 7, 9, 11, 15 and 17, solidary responsibility is not assumed in any way between the acquirer of the vessel and its previous owner, only Article 9 imposes the obligation of ascertaining that the vessel is inscribed in the Registry of the Promoting Entity and "is found current in the payment of contributions" but only as a necessary requirement "for the Maritime authorities to authorize its departure to sea," but without any possibility that the non-fulfillment of said obligation converts the violator in a subrogee of the pending obligations and solidarily responsible for the quotas corresponding to the previous owners of the vessel. Neither does the Compiled Text of the General Social Security Law, approved by D.2065/1974 of 30 May establish the questioned responsibility, although only [under] the solidary responsibility of Article 97.2, based on Chapter III "Protecting Action" and Section 2nd "General Regime of Contributions," in which it is contained, as well as [based on] its

content: "the purchaser will respond solidarily with the [owner] or its heirs for the payment of contributions caused prior to said succession," [the compiled text] does not permit the establishment of a solidary responsibility with respect to the pending contributions in the "cases of succession in the title of the exploitation, industry or business," and if so, only with respect to payment of pensions.

EIGHTH - In the cases of succession of title of vessels, Article 25.1 of the Regulation of 1970-D.1867/70 of 9 July, only empowers the purchaser, and does not require the "request[ing] from the Maritime Social Institute the issuance of an accredited certificate of the status of the Company with respect to its obligations for payment of quotas to said Special Regime" without the non-use of this power implying a solidary responsibility, especially when said precept lacks the legal coverage required to allege said solidary responsibility.

NINTH - The State Attorney alleges that the solidary responsibility of successor companies is covered by article 44 of the Worker's Statute of 1980, which is not admissible since what said precept establishes is that the new businessman shall be "subrogated in the labor rights and obligations of the previous [company]," leaving the assignee and the assignor "both responding solidarily during three years for the labor obligations which arose prior to the proceeding and which were not satisfied," precept, which by being included in Section 2 of Chapter III: Modification, suspension and extinction of the labor contract, "cannot refer to the Social Security quotas owed by the previous owner, but only to the existing labor relationships between the employees of the previous company and the acquirer of same.

TENTH - Neither can one forget that in accordance with

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Articles 43 to 45 of R.D. 716/86 and Article 37.1 of the Order of 23 October 1986, norms already cited, the obligation for payment of Social Security quotas prescribes in five years, beginning with the date they should have been perceptively paid and it will be applied officially in the collection proceedings for both the voluntary period as well as by a judicial collection proceeding. When the petitioner paid on 9 January 1987 the 11,624,612 pesetas, the return of which it claims in this proceeding, and which payment was made "without representing recognition of any debt or responsibility, without prejudice and reserving all rights of actions", the quotas which should have been paid prior to 9 January 1982 were prescribed; of those paid in the Magistrate Labor Court of Cadiz (fs. 22 and 23 rec.), clearly those corresponding to Pesquerías de Barbate, S.A. were prescribed since they were for the year 1970, without knowing their amount, and those paid in the name of Diego Grimaldi, S.A., and in the voluntary period, likewise those corresponding to the period April to December 1981 in the amount of 3,439,328 pesetas (f.14 rec.); concerning the rest, there is not sufficiently clear information in order to opine on their prescription.

ELEVENTH - Whether the quotas which were owed were 11,634,612 pesetas, 6,470,135 or 5,310,031 pesetas or another amount, a question which arises because of the diverse and contradictory certifications which are found in the file and decrees, is totally irrelevant since what is requested by the petitioner is the return of the first amount as an improper payment effected on 9 January 1986; a right which is conceded by Section 3 of Chapter IV of Title I of the Order of 23 October 1986 and Article 59 of the Compiled Text 1974-D2065 of 1974, and although subordinated to a requirement that the amounts "were paid through error of fact or law", in the present case, the return is even more justified, since the petitioner was not obligated to the payment of said quotas, since

these were not charges which would weigh on the vessel, nor any solidary responsibility whatsoever, and if these payments were made under formal protest and due to the negative [response] of the Administration in not granting the export license to the vessel as a consequence of the report issued by the Maritime Social Institute to the effect that the vessel had unpaid social Security quotas, in the total amount of 6,479,135 pesetas, which is not true as has been reasoned, which is why we proceed to accede to the return [of the payments].

TWELFTH - We do not find that bad faith or temerity exists which would warrant the imposition of costs.

WHEREAS, having considered the cited articles of general application,

WE RULE: That rejecting the causes of inadmissibility offered by the State Attorney and Tesorería de la Seguridad Social and finding [the] Resolutions of 11 September and 26 November 1987 of the Tesoreria Territorial de la Seguridad Social de Cadiz not to be in accordance with Law, we void same finding them contrary to the juridical Order, and we accede in part to the claims pled by IMPESCAMAR, S.A. in its petition, ordering Tesoreria to return to the petitioner ELEVEN MILLION SIX HUNDRED THIRTY-FOUR THOUSAND SIX HUNDRED TWELVE pesetas, plus legal interest from 9 January 1987 until the date of payment, and in any event, we hold prescribed those quotas which are prior to 9 January 1982; without costs. And in due course with a certification of this judgment for its fulfillment, we return the administrative file to its place of origin.

Thus, this our judgment, definitively ruling, and we pronounce, order and sign same.

Appendix A

SIGNATURES

That inserted [hereinabove] comports to the letter with its original which I forward, the judgment remaining deposited in the Secretariat. And to confirm same, I issue the present,

SIGNATURES

SEAL

APOSTILLE (or sole legalization)

(Hague Convention of 5 October 1961
Royal Decree/1978 of 2 October)

1. Country: Spain

The present public document.

2. Has been signed by D. NARCISO RODRIGUEZ ESCOBAR.